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No. 83-276

In the Supreme Court of the United States

OCTOBER TERM, 1983

SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS

v.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL., APPELLEES

SELECTIVE SERVICE SYSTEM, ET AL.,

v.

BRADLEY BOE, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT FOR THE STATE OF MINNESOTA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY THIS APPEAL

1. Whether the Court of Appeals possessed jurisdiction in this appeal and therefore erroneously transferred it to this Court.

2. Whether the District Court erred in finding that the Minnesota Public Interest Research Group (MPIRG), a non-profit student organization, did not have standing to represent its members in a challenge to the constitutionality of Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748 (1982) (to be codified at 50 U.S.C. App. §462), notwithstanding the facts that 1) the law challenged requires students to demonstrate compliance with Section 3 of the Military Selective Service Act, 50 U.S.C. App. §453, in order to be eligible for any form of financial aid for post-secondary education provided under Title IV of the Higher Education Act of 1965, 20 U.S.C. §1070 *et seq.*; 2) MPIRG has 42,000 student members from ten campuses in Minnesota; 3) MPIRG's members will be injured by the law; and 4) there was no evidence of any "diversity of view" amongst MPIRG's members.

3. Whether, in the alternative, the District Court erred in not allowing amendment of MPIRG's Complaint.

PARTIES TO THE PROCEEDING

The parties to this proceeding are as follows:

Minnesota Public Interest Research Group, Inc., appellants with respect to this "standing" issue due to a transfer of its appeal from the Eighth Circuit Court of Appeals.

Selective Service System, Major General Thomas K. Turnage, Director; United States Department of Education, Terrel H. Bell, Secretary, appellees in this matter.

TABLE OF CONTENTS

Pages

Opinions below 2

Jurisdiction 2

Constitutional and statutory provisions involved 6

Statement 7

The questions are substantial 9

Conclusion 22

TABLE OF AUTHORITIES

Cases:

American College of Obstetricians v. *Thornburgh*, 552 F.Supp. 791, 795 (E.D.Penn. 1982) 13

Assay v. *Hallmark Cards, Inc.*, 594 F.2d 692 (8th Cir. 1979) 22

Associated General Contractors v. *Otter Tail Power Co.*, 611 F.2d 684 (8th Cir. 1979) 9,10,13,16,19,20,21

Boyce v. *Rizzo*, 78 F.R.D. 648, 704 (E.D.Penn. 1978) 13,17

Bradley Boe v. *Selective Service System*, No. 83-100 (June 16, 1983) 3,4,18,19

Brotherhood Railway Carmen of the U.S. v. *Delpro, Co.*, 549 F.Supp. 780, 782-3 (D.Del. 1982) 12

Chestnut v. *St. Louis County, Missouri*, 656 F.2d 343 (8th Cir. 1981) 21

Consumers Union of the United States v. *Federal Trade Commission*, 691 F.2d 575, 577, fn. 9 (D.C.Cir. 1982) 17

Consumer Union of the United States v. *Miller*, 84 F.R.D. 240, 245 (D.D.C. 1979) 14,16,18,19

Donovan v. *Richland County Association For Retarded Persons*, 454 U.S. 389, 391, n. 3 (1982) 4

Federal Election Commission v. *National Right to Work Committee*, 501 F.Supp. 422, 433 (D.D.C. 1980) 14

Forman v. *Davis*, 371 U.S. 178 (1962) 22

Freeman v. *Continental Gin Co.*, 381 F.2d 459 (5th Cir. 1967) 21

Fusari v. *Steinberg*, 419 U.S. 379, 387, n. 13 (1975) 5

G.A. Buder v. *Merrill Lynch, Pierce, Fenner and Smith*, 644 F.2d 690 (8th Cir. 1981) 21

Harris v. *McRae*, 448 U.S. 297, 321 (1980) 13

Health Research Group v. *Kennedy*, 82 F.R.D. 12, 18, 19 (D.D.C. 1979) 14

Hunt v. *Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) 9,10,11,12,13,14,15,16,17,19

International Ladies Garment Workers Union v. *Donnelly Garment Company*, 121 F.2d 561 (8th Cir. 1941) 22

International Woodworkers v. *Chesapeake Bay Plywood*, 659 F.2d 1259, 1267 (4th Cir. 1981).....15

John Doe et al. and Bradley Boe et al. v. *Selective Service System et al.*, 557 F.Supp. 937 (D.Minn. 1983) 3

Massachusetts Hospital Association v. *Harris*, 500 F.Supp. 1270, 1277 (D.Mass. 1980).....12

McLucas v. DeChamplain, 421 U.S. 21, 30-31 (1975) 3,4

MPIRG v. *Butz*, 358 F.Supp. 584, 619 (D.C.Minn. 1973), affirmed, 498 F.2d 1314 (8th Cir. 1974) 19

MPIRG v. *Butz*, 498 F.2d 1314 (8th Cir. 1974) 17

MPIRG et al. v. Gordon Johnson, Chief of Police et al., No. 4-72-Civ. 255 (September 22, 1972) (Hon. Judge Earl Larson) ..20

MPIRG v. *Selective Service System, et al.*, 557 F.Supp. 923, 925 (D.Minn. 1983); Slip. Op. No. 3-82-1670 (January 24, 1983) 2,3,4,5,6,10

National Collegiate Athletic Association v. *Califano*, 622 F.2d 1382, 1991 (10th Cir. 1980).....15,16

National Association of Rehabilitation v. *Schweiker*, 550 F.Supp. 357, 365 (D.D.C. 1982) 17

National Constructors Association v. *National Electric Contractors*, 498 F.Supp. 510, 521 (D.Md. 1980).....15,16,19

National Office Machine Dealers v. *Monroe, the Calculator Company*, 484 F.Supp. 1306, 1308 (N.D.Ill. 1980).....13,16

Public Citizen v. *Foreman*, 631 F.2d 969, 974, fn. 12 (D.C.Cir. 1980).....17

Schweiker v. *Gray Panthers*, 453 U.S. 34, 40 (1981) 16

Sierra Club v. *Morton*, 405 U.S. 727, 736, fn. 8 (1972).15,18,19,22

United States v. American Friends Service Community, 419 U.S. 7, 12, n.7 (1974).....5

United States v. *Raines*, 362 U.S. 17, 27, n.7 (1959) 4,5

United States v. *SCRAP*, 412 U.S. 669, 678-688 (1973) 17

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982).....12,16,17

Warth v. Seldin, 422 U.S. 490 (1974) 10,11,12,13,15,16,17,19

Williams v. Zbaraz, 448 U.S. 358 (1980).....5

Statutes:

Privacy Act of 1974, 5 U.S.C. §552a *et seq*.....8

Rule 15 of the Federal Rules of Civil Procedure 21

Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748 (1982) 7,8,11,12,18,20

Section 3 of the Military Selective Service Act, 50 U.S.C. App. §453.....7

Title IV of the Higher Education Act of 1965, 20 U.S.C. §1070 *et seq*.....8

28 U.S.C. §1291 2,3,5,7,9

28 U.S.C. §1252 2,3,4,5,6,9

Miscellaneous:

J. Moore, *Federal Practice* §411.23 (1982) 5

Supreme Court Rules 10.4.....5

U.S. Constitution, Art. III 9,12

Websters Seventh New Collegiate Dictionary, G.C.C. Merriam Company (1965) 16

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the District Court of January 24, 1983 dismissing MPIRG is reported at 557 F.Supp. 925 and included herein as Appendix A. The opinion of the District Court denying MPIRG's motions for reconsideration and to amend the complaint is unreported and included as Appendix B. The Court of Appeals transferred the appeal from those decisions in the order of August 17, 1983 which is included herein as Appendix D.

JURISDICTION

The jurisdiction of the district court below in this matter was based on 28 U.S. §1331. The relevant judgments of the district court were entered on January 24, 1983 and March 16, 1983. A notice of appeal was filed for review in the Court of Appeals for the Eighth Circuit on May 13, 1983 (Appendix C). The jurisdiction of the Court of Appeals was based on 28 U.S.C. §1291. Acting upon a motion to dismiss filed by the Selective Service System and the Department of Education, and over MPIRG's written objections, the Court of Appeals transferred the appeal to this Court purportedly pursuant to 28 U.S.C. §1252 on August 17, 1983. MPIRG contends that the Court of Appeals erred in its conclusion that this case should be transferred and respectfully submits that it should be remanded to the Eight Circuit.[1] Alternatively, if this Court finds that a remand is inappropriate, jurisdiction should be noted under 28 U.S.C. §1252.

MPIRG filed the lawsuit from which appeal is taken on November 23, 1982 in the District of Minnesota. The lower court dismissed MPIRG for lack of standing on January 24, 1983. That court entered judgment against MPIRG but allowed intervenors to continue with the case, Civil Action No. 82-1670. (App. A, *infra*, a9).

The district court's decision on the standing issue constituted a final judgment under 28 U.S.C. §1291 which provides that the Court of Appeals is to have jurisdiction of all appeals from final decisions except where direct review may be had in the U.S. Supreme Court. After denial of a motion for reconsideration of the dismissal, MPIRG filed a *timely appeal* before the Court of

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[1] At the time this case was transferred from the Eighth Circuit to this Court,

Appeals for the Eighth Circuit on May 13, 1983.[2]

A preliminary injunction pursued by the intervenors in Civil Action No. 82-1670 and by other plaintiffs (represented by MPIRG) in the companion case of *Bradley Boe et al. v. Selective Service System et al.*, Civil Action No. 83-100, was granted on March 9, 1983. *See John Doe et al. and Bradley Boe et al. v. Selective Service System et al.*, 557 F. Supp. 937 (D.Minn. 1983). (*See* Appendix A of Jurisdictional Statement docketed August 19, 1983 in No. 83-276. The preliminary injunction was appealable directly to the U.S. Supreme Court under 28 U.S.C. §1252 [*see McLucas v. DeChamplain*, 421 U.S. 21, 30-31 (1975)], however, the Government chose not to appeal. A final injunction and declaratory judgment was issued on June 16, 1983. (*See* Appendix B of Jurisdictional Statement docketed August 19, 1983 in No. 83-276.) The Government filed an appeal of the injunction

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MPIRG had already filed its Brief in Chief which represented a great investment of time and resources. Before the due date for the response brief, a motion to dismiss was filed by the Selective Service System and the Department of Education based on 28 U.S.C. §1252. Upon the transfer, MPIRG was uncertain as to the required procedures in this situation and therefore consulted with the Clerk of the Supreme Court. After extensive discussion, the Clerk informed MPIRG that a jurisdictional statement would have to be filed in the matter and that any arguments with respect to this Court's jurisdiction must be included in this section of the jurisdictional statement. MPIRG feels the duplicative and expensive effort of preparing a jurisdictional statement emphasizes the inequitable and unreasonable result of the Court of Appeals decision.

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[2]What actually occurred, quite ironically, supports MPIRG's arguments *infra* that this appeal is properly placed in the Court of Appeals and not in this Court. MPIRG was dismissed as a party on January 24, 1983 from Civil Action No. 82-1670. When denial of the motion for reconsideration was rendered on March 16, 1983, MPIRG was not even served by the district court as MPIRG had been removed from the docket sheets. MPIRG had no knowledge of the judgment until it was inadvertently discovered during a conference call with Judge Alsop on April 26, 1983, with respect to another matter. Counsel for the Government participated in that call. When the court's error was brought to light, MPIRG was immediately served by the district court on April 27, 1983. MPIRG was within its rights to request more time to prepare its appeal papers, however, such papers were quickly prepared and filed on May 13, 1983, so as not to delay the appeal any longer.

under 28 U.S.C. §1252 on June 27, 1983. On July 18, 1983, the Government filed a motion to dismiss before the Court of Appeals, claiming that, *at the moment* the appeal to the U.S. Supreme Court was filed, the instant appeal was no longer appropriately before the Circuit Court. That assumption is erroneous and the Eighth Circuit erred in transferring the appeal to this Court. The Eighth Circuit Court possesses jurisdiction to entertain this appeal and therefore it should be remanded.

28 U.S.C. §1252 provides that in the event a Court of the United States rules, in any interlocutory or final judgment, that an Act of Congress is unconstitutional in any manner *and* the Government is a party to the action, then that ruling may be appealed directly to the U.S. Supreme Court. The provision acts to remove appellate jurisdiction under 28 U.S.C. §1291 from the Courts of Appeal "to afford immediate review in th[e] [Supreme] Court in all actions to which the United States...will be bound by a holding of unconstitutionality." *McLucas*, 421 U.S. at 31. *See* also *Donovan v. Richland County Association For Retarded Persons*, 454 U.S. 389, 391 n. 3 (1982). Pursuant to 28 U.S.C. §1252, both the preliminary injunction and the final decision granted in Civil Action No. 82-1670 and Civil Action No. 83-100, *supra*, were appealable directly to the Supreme Court, as the basis for such decisions was that an Act of Congress was deemed unconstitutional. *McLucas*, 421 U.S. at 31.

It is well settled that, under 28 U.S.C. §1252, not only does the Supreme Court have jurisdiction to review that portion of a decision ruling a Congressional act unconstitutional, but also other aspects of the case that are appealable. In other words, the appeal to the Supreme Court brings to the High Court "the whole case." *United States v. Raines*, 362 U.S. 17, 27 n. 7 (1959); *McLucas*, 421 U.S. at 31-32. The last part of 28 U.S.C §1252 addresses this concept and provides:

> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

The purpose of this language is to prevent piecemeal appeals. *See* J. Moore, *Federal Practice* §411.23 (1982). It is this language that appears to be the basis for the Eighth Circuit transfer.

MPIRG does not dispute the purpose of this last requirement of 28 U.S.C. §1252. After all, on appeal, the appellant has the right to argue all issues not waived and the appellee has the right of cross-appeal if necessary. It would be a waste of time and resources if the Supreme Court considered certain aspects of a case while the Court of Appeals considered others. Consequently, a review of the case law in this area indicates, for instance, that the Supreme Court will hear the appellants' questions concerning threshold jurisdictional matters as well as the finding of unconstitutionality, *United States v. American Friends Service Community*, 419 U.S. 7, 12 n. 7 (1974). The Supreme Court will also hear the appellee's contentions in a cross-appeal that the Court's finding should have been based on alternative grounds, *Raines*, 362 U.S. at 27, n. 7. *See* also *Lusari v. Steinberg*, 419 U.S. 379, 387 n. 13 (1975); *Williams v. Zbaraz*, 448 U.S. 358 (1980).

It is *imperative* to note, however, that all of these "other" issues to be decided by the Supreme Court became appealable or were otherwise to be considered *at the time* the right to appeal under 28 U.S.C. §1252 arose *and* were issues to be raised *by the parties* to the action *at that time*, e.g., the appellant and the appellee. It is contemplated by 28 U.S.C. §1252 that these "other" issues are an integral part of "the whole case" and are what should be before the Supreme Court. This rationale cannot be applied to the instant appeal.

The right of appeal to the Eighth Circuit in this action arose under 28 U.S.C. §1291 on January 24, 1983. MPIRG, as a party, was dismissed by the district court; MPIRG was no longer a party in Civil Action No. 82-1670.[1] The decision was a *final* one in the district court. Except for the decision to proceed with a motion for reconsideration, the appeal before this Court may have

[1] Supreme Court Rule 10.4 states that "all parties to the proceeding in the court from whose judgment the appeal is being taken shall be deemed parties in this Court." MPIRG had no involvement as a party in the decision rendered by the district court from which the Government's appeal is taken. Therefore, MPIRG was not a party *in the proceeding* concerning the injunction in the lower court nor is it a party in the appeal of that injunction before this Court.

already been completed. There was no right to proceed directly to the Supreme Court at that time, nor was there any ability to delay appeal such as with an interlocutory order. MPIRG had strict time guidelines governing its appeal, and properly filed its appeal before the Eighth Circuit. MPIRG's Brief in Chief and two briefs filed by *amicus curiae* were submitted. The issue of MPIRG's "standing" in Civil Action No. 82-1670 was now a separate case from that which was continued by the intervenors. The appeal of the "standing" case proceeded separately from the rest of Civil Action No. 82-1670.

The appeal in the Supreme Court filed by the Government *six months* after the final decision on the "standing" question does not act to bring the issue, nor MPIRG, before the Supreme Court now. Actions manipulated by a party in one case cannot be allowed to interfere with the rights of parties in another case. 28 U.S.C. §1252 was not intended to reach so far as to achieve such a result, nor should such a result come from a decision of this Court.

The Eighth Circuit's apparent conclusions with respect to 28 U.S.C. §1252 are in error. Therefore, MPIRG respectfully urges that this Court remand this appeal to the Court of Appeals for the Eighth Circuit.

STATUTORY PROVISIONS INVOLVED

1. Section 1252 of the United States Code provides:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other

courts prior to such notice shall be treated as taken directly to the Supreme Court.

2. Section 1291 of the United States Code provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

On November 23, 1982, the Minnesota Public Interest Research Group ("MPIRG"), filed its Complaint in U.S. District Court in the District of Minnesota seeking declaratory judgment and injunctive relief on the claim that Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748 (1982) (hereinafter "Section 1113") was unconstitutional (Appendix to appellant's brief filed in the Eighth Circuit (hereinafter "8th Cir. App.") 43-9, 75-81). That section of the Defense Authorization Act amends the Military Selective Service Act (hereinafter the "Selective Service Act") and says essentially that no draft age male student can receive federal financial aid until he proves that he has not violated the draft registration law contained within §3 of the Military Selective Service Act, 50 U.S.C. App. §453. Additionally, MPIRG filed a Motion for Preliminary Injunction (8th Cir. App. 50-2), supporting affidavits (8th Cir. App. 53-65) and a supporting brief (Excerpts, 8th Cir. Ap. 66-8) at the same time.

Plaintiff MPIRG challenged the validity of Section 1113 on the following grounds: 1) it constituted an unconstitutional Bill of

Attainder; 2) it deprived students of their Fifth Amendment rights against self-incrimination; 3) it discriminated on the basis of gender, race and wealth; and 4) it violated the provisions of the Privacy Act of 1974, 5 U.S.C. §552a *et seq.*

The defendants, on December 16, 1983, filed a Motion for Judgment on the Pleadings (8th Cir. App. 69-71) arguing that MPIRG lacked standing and that the case was not ripe for review. The defendants' arguments with respect to standing focused around their claim that no individual had been injured. The plaintiff filed a motion to amend its complaint to address some of the defendants' claims (8th Cir. App. 72-4). Additionally, the plaintiff filed a Response in Opposition to Defendant's Motion for Judgment on the Pleadings (Excerpts, 8th Cir. App. 85-92). Oral arguments on all the motions were entertained by the district court on January 10, 1983 (Excerpts, 8th Cir. App. 93-104).

On January 24, 1983, the District Court found that MPIRG did not have standing to bring this action. (Appendix a1-a20).

MPIRG had argued to the court that it is a student directed, non-profit organization that works to promote the interests of students. (8th Cir. App. 45, 67, 77, 88-9, 94). All of its approximately 42,000 members from ten campuses in Minnesota are college and university students (8th Cir. App. 46, 68, 78, 88-9, 94). MPIRG has maintained an active and continuous interest in student financial aid (8th Cir. App. 53-62, 67, 96-7, 106-7). It brought this action as an organization, representing the rights of its members. MPIRG's duly elected student board of directors unanimously voted to file this action. (8th Cir. App. 92, 94, 98, 106-7).

Among MPIRG's members were students who would be severely injured by implementation of Section 1113. They were required to register under Section 3 of the Selective Service Act but did not. They had received and would continue to need and apply for financial assistance under Title IV of the Higher Education Act, 20 U.S.C. §1070 *et. seq.*, in order to attend their respective colleges and universities. Implementation of Section 1113 would deprive or seriously impair these young men in their ability to attend their respective schools (8th Cir. App. 63-5, 75-81).

Specifically, Judge Donald Alsop found that members of MPIRG did possess the requisite injury to establish standing

under Article III of the U.S. Constitution and associated cases (App. a10-a13), but that MPIRG could not claim representational standing because 1) the claim asserted was not "germane" to the purposes of the organization (Appendix a10-a14) and 2) there existed a "diversity of view" amongst MPIRG's members thereby requiring individualized participation in the suit (Appendix a14-a18). MPIRG was therefore dismissed from the suit and its motion for a preliminary injunction was denied.

On February 1, 1983, Plaintiff MPIRG filed a motion for reconsideration and a motion for leave to amend its complaint. Both requests were denied by Judge Alsop on March 16, 1983. (Appendix a21-a24).

Both decisions were appealed on May 13, 1983 to the Eighth Circuit Court of Appeals (App. C). Upon the Government's motion to dismiss based on 28 U.S.C. 1252, and over MPIRG's objections, the Eighth Circuit transferred the appeal to this Court on August 17, 1983.

THE QUESTIONS ARE SUBSTANTIAL

I. If this Court Accepts Jurisdiction on this Matter Without Giving MPIRG Full Opportunity to be Heard on the Merits in Briefing and Oral Argument, MPIRG will be Effectively Denied its Right of Appeal.

As argued *supra*, it is MPIRG's contention that this appeal should be remanded to the Court of Appeals for the Eighth Circuit. However, if this Court finds that a remand is inappropriate, jurisdiction should be noted under 28 U.S.C.§1252 and MPIRG should be provided a full opportunity to be heard on the merits. This Court must review the questions presented in the same manner as the Court of Appeals, had the appeal not been transferred. Any less the review would result in a denial of the right of appeal established under 28 U.S.C. §1291 and would constitute an injustice.

II. The District Court Erred in Dismissing MPIRG for Lack of Standing: MPIRG Possesses Standing to Bring the Instant Action Under Hunt and Associated General Contractors.

On January 24, 1983, MPIRG was dismissed as an organization before the Court on behalf of its members for lack of stand-

ing. 537 F.Supp. 925 (D.Minn. 1982) (Appendix A). In reaching its decision, the District Court used what it construed to be a three prong test for associational or representational standing contained in the U.S. Supreme Court case of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977).

The District Court correctly noted that *Hunt* followed reasoning of the previous case of *Warth v. Seldin*, 422 U.S. 490 (1974), which stated that an association has standing to bring action as the representative of its constituents:

> The association must allege that its members, *or any one of them*, are suffering immediate or *threatened injury* as a result of the challenged action *that would make out a justiciable case had the members themselves* brought suit . . . So long as this can be established, *and* so long as *the nature of the claim and of the relief sought does not make individual participation* of each injured party *indispensable* to proper resolution of the cause, the association may be appropriate representative of its member . . .

Warth, 422 U.S. at 511 (*emphasis added*); (Appendix a9). The Supreme Court in *Warth* goes on to state that the proper relief to be requested in such cases of associational standing is prospective relief in the form of declaratory and injunctive relief, because, "it can reasonably be supposed that [such] remedy, if granted, will *inure to the benefit of those members of the association actually injured.*" *Warth*, 422 U.S. at 515 (*emphasis added*). A request for damages, for instance, would require "individualized proof" as was the case in *Warth*.

Hunt, appears to articulate the statements of *Warth* into a three prong test:

> Thus, we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

432 U.S. at 343.

In utilizing the so-called *Hunt* three prong test in its analysis of the standing question in the case at bar, the Court found that MPIRG clearly met the first prong, i.e. that "threatened injury is firmly established as meeting the injury in fact test." (Appendix a9-a10). However, the Court went on to dismiss MPIRG on the second two prongs. Specifically, the Court stated that MPIRG's interest in protecting students' interest in their constitutional rights is not germane to the purposes of the organization (Appendix a10-a14) and that MPIRG is not in a position to speak for its members because there is a "diversity of view" amongst its members (Appendix a14-a18). It should be noted that, for the purposes of ruling on a motion to dismiss for lack of standing, both the trial court and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. *Warth*, 422 U.S. at 501.

The District Court further relied on *Associated General Contractors v. Otter Tail Power Co.*, 611 F.2d 684 (8th Cir. 1979) as providing for the Eighth Circuit a very strict and narrow view of *Hunt*, and therefore, implied that it had no flexibility in analyzing MPIRG's standing in this case.

MPIRG submits that the District Court erred in its application of *Hunt* and *Associated General Contractors* to the facts in this case. First, a complete understanding of these cases indicates that they were not intended to announce new limitations on associational standing. They simply restate a well established principle; what the Court should look for in associational standing is that the association be an adequate proponent for the *real* interests of its members. Secondly, even assuming *Hunt* and *Associated General Contractors* put forth a new, more stringent test of associational standing, MPIRG possesses appropriate standing to bring this action.

MPIRG is a non-profit college student organization. The law challenged affected college students. There was *no* evidence presented that indicated that there existed a "diversity of view" amongst MPIRG's members. In fact, MPIRG's duly elected student board of directors voted unanimously to file the suit. The District Court simply assumed such diversity. Therefore, the District Court erred in finding that MPIRG does not have standing to challenge §1113 of the Defense Authorization Act on

behalf of its members.

The following synopsis of the appellant's argument further illustrates the substantiality of the issues presented by this appeal of the District Court's decision.

A. MPIRG Meets the Traditional Representational Standing Test of Warth v. Seldin and Later Cases.

1. MPIRG Members Could Sue on Their Own Behalf.

The court below found that MPIRG met the first element of the *Warth* and *Hunt* tests for representational or organizational standing, i.e. that one or more of MPIRG's members would have standing to seek to enjoin §1113 of the Defense Authorization Act on their own. (Appendix a9). Specifically, Article III of the U.S. Constitution requires that a party, or a representative on behalf of the party, seeking the court's jurisdiction, show that the party has personally suffered some actual or threatened injury as a result of the defendant's putatively illegal conduct, and that the injury be fairly traced to the challenged action, as well as likely to be redressed by a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). The District Court recognized that MPIRG's members meet these constitutional requirements of standing.

2. Neither the Claim Asserted Nor the Relief Requested Required the Participation of MPIRG's Individual Members in this Lawsuit.

Warth and *Hunt* also require that "neither the claim asserted nor the relief requested requires the participation of [MPIRG's] individual members in th(e) lawsuit" in order for an organization to have standing. *Hunt*, 432 U.S. at 343. It is well settled that an association bringing an action for declaratory and injunctive relief does not need participation of its members in the lawsuit with regard to the remedy requested. *Warth; Hunt; See* also *Massachusetts Hospital Association v. Harris*, 500 F.Supp. 1270, 1277 (D.Mass. 1980) (where a request for individual damages required individualized proof). *See* also *Brotherhood Railway Carmen of the U.S. v. Delpro, Co.*, 549, F.Supp. 780, 782-3

(D.Del. 1982), (where money damages required individualized proof). In *National Office Machine Dealers v. Monroe, the Calculator Company*, the Court stated "(O)ne injunction is as effective as 100, . . . 100 injunctions are no more effective than one (citation omitted)." 484 F.Supp. 1306, 1308 (N.D.Ill. 1980).

a. Individual Members Need Only Participate in the Suit Where the Claim Requires Individual Proof of Injury.

The issue presented to a court when considering the need for individual participation is whether the claim itself requires "individualized proof" to establish the harm. Such question is what concerned the Supreme Court in *Hunt*. Consequently, "individualized proof" was required when a single person was fired by the Philadelphia School District allegedly for political reasons in *Boyce v. Rizzo*, 78 F.R.D. 648, 704 (E.D. Penn. 1978). The district court in that case found that "her case is unique and based on more than mere patronage." Similarly, the Supreme Court in *Harris v. McRae*, found the effect on religious beliefs so personal that individualized harm must be established. 448 U.S. 297, 321 (1980). *See* also *American College of Obstetricians v. Thornburgh*, 552 F.Supp. 791, 795 (E.D. Penn. 1982).

The District Court relying on *Associated General Contractors*, interpreted *Hunt* as requiring participation of individual members where there is a "diversity of view" among the members of the organization. By accepting the theorized "diversity of view" proposed by the government, the District Court failed to follow the standard enunciated by the Supreme Court in *Warth* and *Hunt*. *Associated General Contractors* does not set a new standard but merely illustrates a situation where "the interests of the members [were] too diverse and the possibilities of conflict too obvious to make the association an appropriate vehicle to litigate the claims of its members." 611 F.2d 684, 691 (8th Cir. 1979). A correct reading of this case, consistent with the standard enunciated in *Hunt* and *Warth* would require participation of individual members only where there is a showing that a "diversity of view" makes the organization an inappropriate vehicle through which to litigate the claims of its members. Not only has no showing been made in this case, but MPIRG has clearly established that it is a proper representative for its injured members.

b. There is No Diversity of View Amongst MPIRG Members.

Even assuming that the District Court was correct in accepting a mere showing of a "diversity of view" without an accompanying showing that it would interfere with the representation by the organization, the court erred in finding that there was a "diversity of view" in this case. The consistency of view on this issue is well established in the transcript from the oral argument and accompanying affidavits.

MPIRG is a non-profit student organization, concerned with issues of importance to the student community. *See* 8th cir. App. 67-8, 88-9, 94, 96-7, 106-7. It is comprised of a voluntary student membership. MPIRG has a long history on college campuses where its purpose and the manner in which it has carried out that purpose has been constantly visible. *See* 8th Cir. App. 53-62, 67, 96-7, 106-7. MPIRG has a duly elected student Board of Directors. This Board voted unanimously to file this present lawsuit. See 8th Cir. App. 92, 94, 95, 106-7. The action of an elected board of representatives of the membership is determinative in deciding the proper course of an organization. *Health Research Group v. Kennedy*, 82 F.R.D. 21 (D.D.C. 1979) originally cited by Defendants in attempting to reinforce its "diversity of view" idea, is actually extremely supportive of the opposite position. The District of Columbia's district court found that the Health Research Group had no standing to represent its contributors because they had no ability to elect the Board of Directors. The Court concluded that if the Board had been duly elected it would have allowed the organization to represent the members in a court action. *Id.* at 27. See *Hunt*, 432 U.S. at 344-5; *Consumer Union of the United States v. Miller*, 84 F.R.D. 240, 245 (D.D.C. 1979); *see* also *Federal Election Commission v. National Right to Work Committee*, 501 F.Supp. 422, 244 (D.D.C. 1980).

Presented with this showing of the consistency of view among MPIRG members, the District Court still found that there was a "diversity of view." The Court concluded that since 97% of those who were required to register for the draft did so there were some members of MPIRG who had registered as required. The Court then summarily concluded that this meant that there was an ideological diversity among the membership as to the constitu-

tionality of the law in question. This hypothesis is supported by neither evidence nor logic.

Merely because members of MPIRG have registered for the draft or were not required to register (i.e. women) does not mean that those same members would favor a law which induces compliance with the draft registration requirement in an unconstitutional manner. The District Court has apparently interpreted the concept of "no diversity of view" to mean that *all* members must suffer identical injury. The fact that all of the members are not injured does not defeat standing as it is not an element of standing. *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972). Moreover, as the Court in *National Collegiate Athletic Association v. Califano*, seems to indicate, even where members are "cheering both sides of the litigation", as long as an organization alleges that at least one member is injured, evidence would be needed to show a conflict sufficient to defeat standing, thereby requiring individualized proof of harm. 622 F.2d 1382, 1391 (10th Cir. 1980). *See National Constructors Association v. Nation Electric Contractors*, 498 F.Supp. 510, 521 (D.Md. 1980). It appears as though it would take a very significant conflict to defeat standing and courts have been reluctant to find such conflict. *See* also, *International Woodworkers v. Georgia Pacific Corp.*, 568 F.2d 1259, 1267 (4th Cir. 1981). No such conflict exists in the instant action.

In addition to the supposed ideological diversity of view, the Court found that there exists a financial conflict of interest between the members of MPIRG. The Government argued and the District Court accepted that more financial aid money will be available to eligible students if those who fail to register become ineligible; therefore it was in the financial interest of many MPIRG members to defend the Act's constitutionality. Again this statement was made without any evidence indicating the extent of financial benefit which might exist. Certainly this assertion by the Government is not enough to defeat standing.

MPIRG clearly meets the second prong of the *Warth* and the third prong of the *Hunt* standing tests. MPIRG is a membership organization, appropriately empowered to represent its members' interests. No "diversity" or conflict amongst those members is evident. The harm alleged is not so personal as to require "in-

dividualized proof." Therefore, the participation of individual members is not necessary. Consequently, MPIRG has standing under the *Warth* test, and meets the first and third prongs of *Hunt*.

B. MPIRG Meets any "Germaneness" Requirements Established by Hunt and Associated General Contractors.

1. The Test of "Germaneness" is Intended to be a Simple One; It Merely Requires Consistency Between the Cause of Action and the Organization's Purposes.

The Supreme Court elaborated on what is an obvious and general requirement for organizational standing in the second prong of the test for associational standing presented in *Hunt*. *Hunt* involved an unusual type of organization, i.e. a state apple growers agency which collected *mandatory* "membership dues" from apple growers. The Court decided that the state agency could sue to enjoin Oregon grading restrictions on behalf of Washington apple growers, but only if it showed "that the interests it (the agency) seeks to protect are germane to the organization's purpose," as well as injury to its members and no need for individualized proof. 432 U.S. at 343.

MPIRG meets any additional test of germaneness established by *Hunt*. Germane means "having a significant connection; pertinent; relevant." *See* Websters Seventh New Collegiate Dictionary, G.C.C. Merriam Company (1965) at 350. The word has been accorded its natural meaning by the Courts. *See National Constructors Association*, 498 F.Supp. at 520-1, (finding the issue presented "pertinent and relevant" to the organization's purpose); *National Office Machine Dealers*, 484 F.Supp. at 1307; and *NCAA v. Califano*, 622 F.2d at 1391.

Thus, in *Hunt*, the Supreme Court decided in one sentence that a state agency could sue the state of Oregon because lifting grading restrictions was relevant to the agency's goal of "protecting and enhancing the market for Washington apples." 432 U.S. at 344. In its more recent associational standing cases, the Supreme Court has simply assumed, or at least obviously recognized, that the claim was germane to the organization's goals. *See Valley Forge; Schweiker v. Gray Panthers*, 453 U.S. 34, 40 (1981); *See* also *Consumer Union v. Miller*, 84 F.R.D. at

244-5; *Bovce v. Rizzo*, 78 F.R.D. at 703, fn.8. *See* also *Public Citizen v. Foreman*, 631 F.2d 969, 974, fn. 12 (D.C.Cir. 1980), (where the court found standing for a non-profit, public interest group challenging certain Food and Drug Administration regulations); *Consumers Union of the United States v. Federal Trade Commission*, 691 F.2d 575, 577, fn.9 (D.C.Cir. 1982); *National Association of Rehabilitation v. Schweiker*, 550 F.Supp. 357, 365 (D.D.C. 1982), (where the court found "germaneness" under *Hunt* because the remedy would inure to the benefit of members).

As these recent cases demonstrate, the test of "germaneness" was not designed to deprive organizations of standing to sue on their members' behalf. It merely establishes a requirement that a common purpose exist between an organization and its members which makes their interests in the outcome of the lawsuit identical and guarantees adequate representation.

In assessing whether the interests sought to be protected were germane to MPIRG's goals, Judge Alsop seems to maintain that in order for an interest to be germane to an organization's purpose it must be among a limited number of specific goals which the organization has adopted. This would eliminate the ability of a broad based public interest and social welfare organization to litigate the interests of its members on any of its issues. MPIRG's mandate is admittedly broad, but not so broad that it should not be allowed to represent its members on any issues.

It seems that the District Court was concerned that MPIRG's purposes are so broad that it is only "airing generalized grievances" in this case. (Appendix a14). *See Valley Forge*, 454 U.S. at 482-3. The District Court need not have worried. The injury requirement of *Warth* and *Hunt* guards against that possibility. As the Eighth Circuit previously noted in *MPIRG v. Butz*, "'Injury in fact' serves to distinguish a person with a direct stake in the outcome--even though small--from a person with a mere interest in the problem," 498 F.2d 1314, 1324 (8th Cir. 1974), citing *U.S. v. SCRAP*, 412 U.S. 669, 689, n. 14 (1973).

The germaneness requirement of *Hunt* insures that the organization which seeks standing as a representative for its members can adequately represent those interests so as to preclude the need for individual participation of its members. Apparently, the District Court ignored that requirement in the in-

stant action. Enjoining §1113 of the Defense Authorization Act is pertinent and relevant to MPIRG's well established purpose and goals. MPIRG is therefore a logical and more than adequate representative for its injured members.

A court can determine what an organization's goals are in two ways: 1) by looking at the formal statement of purpose contained within an organization's articles of incorporation, and 2) by examining the organization's past actions and involvements. *Consumer Union v. Miller*, 84 F.R.D. at 244-5, *Sierra Club v. Morton*, 405 U.S. at 739.

2. An Injunction Would Further MPIRG's Stated Goals of Promoting the Public Interest and Social Welfare.

MPIRG is a non-profit student organization, concerned with issues of importance to the student community. This fact was presented to the court below in several documents. *See* 8th Cir. App. 67-8, 88-9, 94, 96-7, 106-7.

MPIRG's articles of incorporation, filed February 13, 1971 and amended June 12, 1971 (presented to the district court at 8th Cir. App. 106), state:

> The purpose of this Corporation are and shall be to promote the public interest and social welfare, and to do all things as may be necessary or proper to carry out any of the foregoing purposes for which this Corporation is organized.

A democratically elected student board of directors decides what actions are "necessary and proper" to carry out its mandate at periodic meetings throughout the year. This year's duly elected board of directors unanimously decided that §1113 is a direct threat to the public interest and social welfare of the student community MPIRG represents.

Enjoining §1113 of the Defense Authorization Act is pertinent and relevant to MPIRG's goals. As Judge Alsop stated when granting a preliminary injunction against the very same statute in ***Bradley Boe et al. v. Selective Service System et al.***, "enforcement of a law likely to be found unconstitutional is not in the public interest." 557 F.Supp. 937 (D.C.Minn. 1983). Judge Alsop, in granting a declaratory judgment and permanent injunction in that case, found, that §1113 of the Defense Authorization

Act constitutes an unconstitutional bill of attainder and violates students' rights not to incriminate themselves. *Bradley Boe v. Selective Service System*, No. 83-100 (June 16, 1983).

The germaneness test of *Hunt* is very similar to the issue of MPIRG's corporate scope of authority, which the Minnesota District Court examined in *MPIRG v. Butz*, 358 F.Supp. 584, 619 (D.C.Minn. 1973), *affirmed*, *MPIRG v. Butz*, 498 F.2d 1314 (8th Cir. 1974). In addressing the defendant's claims that MPIRG lacked standing because of improper authorization and because the action was beyond the scope of MPIRG's authority, the court stated:

> The Court considers these defenses to be little more than make-weight arguments since it finds that this action is clearly within the plaintiff's corporate purpose "to promote the public interest and social welfare" as those terms were defined by those testifying on behalf of plaintiff and that there is no doubt that this action was properly authorized by plaintiff's Board in accordance with its By-laws.

The reasoning of *MPIRG v. Butz* was not overturned by the Eighth Circuit's decision in *Associated General Contractors*. As the Eighth Circuit declared: "Even in the absence of injury to itself, an association may have standing solely as a representative of its members." *Associated General Contractors*, 611 F.2d at 689, citing *Warth*, 422 U.S. at 511. Clearly all that is needed to fulfill the germaneness requirement of *Hunt* is that the lawsuit is "pertinent and relevant" to MPIRG's stated goal of protecting the public interest and social welfare of its student members. To require more would be to in effect reinstate the personal injury to the organization requirement for associational standing that the Supreme Court rejected in *Warth*. *See National Constructors Association*, 498 F.Supp. at 521.

3. The Suit is Directly Related to MPIRG's Established Goals of Maximizing the Amount of Financial Aid Available to Needy Students.

An organization's purposes are also established by a history of concern in a given area. *Consumer Union v. Miller* 84 F.R.D. at 244-5, *Sierra Club v. Morton*, 405 U.S. at 739. MPIRG has long

been concerned with availability of student financial aid. MPIRG has a full-time staff economist, Dr. Brett Smith. Dr. Smith devotes a substantial amount of time to studying the types and amounts of student funding available, and then evaluating their adequacy in light of current trends. He has completed numerous studies concerning such issues. *See* Affidavit of Dr. Brett Smith in support of Motion for Preliminary Injunction (8th Cir. App. 53-62). Enjoining §1113 is highly germane to MPIRG's goal of ensuring enough student funding so that its members can complete a college education.

4. Enjoining §1113 is Directly Related to MPIRG's Established Goal of Protecting the Constitutional Rights of Students.

MPIRG has a long-standing history of protecting the interests of students in many diversified areas in accordance with its broad mandate. MPIRG has, in fact, specifically represented students in asserting their claims of infringement with constitutional rights and of statutory violations in state and federal courts. *See MPIRG et al. v. Gordon Johnson, Chief of Police et al.*, No. 4-72-Civ. 255 (September 22, 1972) (Hon. Judge Earl Larson) (8th Cir. App. 105-7), (where MPIRG successfully asserted a violation of constitutional rights of its student members). It is proper that MPIRG do likewise now. These actions are consistent with the purposes of the organization.

5. The Claim Raised by the Plaintiffs in Associated General Contractors Clearly Conflicted With the Purpose of Their Organization, and is Not Dispositive in the Instant Case.

Associated General Contractors, a case cited by both the Government and the District Court, presents a factual situation different from that of the case at bar. The District Court erred in its determination that the case was dispositive in the dismissal of MPIRG for lack of standing. That plaintiff organization failed the "pertinent and relevant" test because its stated goals as an organization conflicted with the interests it sought to advance through the suit.

***Associated General Contractors*, concerned a contractor trade association challenging an agreement between power companies**

and unions which required the power companies to hire contractors with "closed shops"(agreeing "to pay wages and fringe benefits equal to minimum standards") for any construction work. 611 F.2d at 691. This case can be distinguished from the instant case for two reasons.

First and foremost, this court found no injury to the contractors to establish injury. MPIRG members will suffer injury. Secondly, the contract that Associated General Contractors sought to have invalidated advanced rather than hindered the purposes of the organization. The stated purpose of the organization was to promote fair labor conditions, and to eliminate unfair or unethical practices. It was obvious that an agreement to pay fair wages and benefits would *improve* labor conditions. The court implied there was nothing unfair or unethical about protecting employees of the contractors as such. The Circuit Court could not find that invalidating the contested agreement would further the interests of the organization, just as it could not find an injury. In contrast, MPIRG's suit will directly advance its goals of protecting the rights of its injured student members.

III. Even If the District Court had Insufficient Information About MPIRG, the Court Erred in Refusing Amendment of the Complaint.

Appellant submits that it has presented information with respect to MPIRG's purpose sufficient to confer standing upon MPIRG to represent its members in the instant case. *See* 8th Cir. App. 43-9, 63-5, 66-8, 75-81, 85-92, 93-104, 105-107. Even if this Court should find that insufficient information with respect to MPIRG as an organization was provided to the district court below, that court erred in refusing to allow amendment of MPIRG's complaint.

After a dismissal by summary judgment, a court may still grant a motion for leave to amend a complaint. *Chestnut v. St. Louis County, Missouri*, 656 F.2d 343 (8th Cir. 1981); *G.A. Buder v. Merrill Lynch, Pierce, Fenner and Smith*, 644 F.2d 690 (8th Cir. 1981); *Freeman v. Continental Gin Co.*, 381 F.2d 459 (5th Cir. 1967). As a general matter, Rule 15 of the Federal Rules of Civil Procedure provides that leave to amend pleadings shall be freely

given when justice so requires. *Forman v. Davis*, 371 U.S. 178 (1962); *Assay v. Hallmark Cards, Inc.*, 594 F.2nd 692 (8th Cir. 1979); *See* also *International Ladies Garment Workers Union v. Donnelly Garment Company*, 121 F.2d 561 (8th Cir. 1941). The Supreme Court recognized the Sierra Club's ability to amend its complaint at the district court level to cure its standing problems. *Sierra Club*, 405 U.S. at 736, fn.8.

The proposed Second Amended Complaint attached to MPIRG's motion for leave to amend (8th Cir. App. 112-128) clearly demonstrates that MPIRG possesses representational standing to bring this action. Therefore, justice dictates that the Motion for Leave to Amend Complaint should have been granted by the district court below.

CONCLUSION

MPIRG respectfully urges this Court to remand this appeal to the Eighth Circuit Court of Appeals. Alternatively, probable jurisdiction should be noted and the questions presented are so substantial that full review by this Court is merited.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

MINNESOTA PUBLIC INTEREST RESEARCH GROUP (MPIRG),

Plaintiff,

and

JOHN DOE, RICHARD ROE, and PAUL POE,

Intervening Plaintiffs,

v.

SELECTIVE SERVICE SYSTEM, Major-General Thomas K. Turnage, Director; and UNITED STATES DEPARTMENT OF EDUCATION, Terrel H. Bell, Secretary,

Defendants.

3-82 Civ. 1670

MEMORANDUM ORDER

E. GAIL SUCHMAN, Esq. and DANIEL W. LASS, Esq., Minneapolis, Minnesota, appeared for plaintiff.

NEIL H. KOSLOWE, Esq., Department of Justice, Washington, D.C., appeared for defendants.

WILLIAM J. KEPPEL, Esq., Minneapolis, Minnesota, appeared for intervening plaintiffs John Doe, Richard Roe and Paul Poe.

This matter comes before the court upon the motion of defendants Selective Service System and United States Department of Education for judgment on the pleadings. Plaintiff Minnesota Public Interest Research Group (MPIRG) has moved for a preliminary injunction to enjoin the enforcement of Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748 (1982) amending the Military Selective Service Act, 50 U.S.C. App. §§ 451-473 (1981). A copy of the amendment is attached as "Exhibit A" to this order.

Plaintiff MPIRG is a college student-directed, nonprofit Minnesota corporation qualified to do business in Minnesota. Plaintiffs John Doe, Richard Roe and Paul Poe are all male residents of Minnesota, 19 to 21 years old, subject to Section 3 of the Selective Service Act who intend to apply for financial aid under Title IV of the Higher Education Act of 1965, 20 U.S.C. §§ 1070-1089 for the 1983-84 school years, who will be unable to complete their educations without financial aid, and who cannot file a truthful statement of compliance with Section 3 and regulations thereunder. Defendant Selective Service System is an agency of the United States. Defendant Major-General Thomas Turnage is the Director the Selective Service System. Defendant United States Department of Education is an agency of the United States. Defendant Terrel H. Bell is the Secretary of the United States Department of Education. Defendants have opposed plaintiff MPIRG's motion and have moved for judgment on the pleadings, alleging that the suit is not justiciable under U.S. Const. Art. 3 because plaintiffs lack standing to sue and because the suit does not raise a "case or controversy." Since significant challenges to this court's jurisdiction have been made, the court must examine those issues before considering the merits of the case.

Defendants' motion for judgment on the pleadings will be treated as a motion for summary judgment pursuant to Fed. R. Civ. P. 12(c) because matters outside the pleadings were presented to and considered by the court. In addition, since defendants' challenges to the intervenors' standing and the ripeness of their suit parallel defendants' challenges to the original plaintiff's standing and the ripeness of its suit, those issues will be treated together.[1] Finally, this memorandum con-

[1] See order on motion to intervene of John Doe, Richard Roe and Paul Poe.

stitutes the findings of fact and conclusions of law of the court.

I. The Case or Controversy Requirement

Federal courts are courts of limited jurisdiction. They are not to decide abstract, hypothetical or contingent questions but instead must focus on a specific live case or controversy. This ripeness doctrine has both a constitutional component based on Article III limitations on judicial power and a prudential component based on the discretionary power of the courts to refuse review for policy reasons.[2] This reluctance to invoke the power of the courts is:

> derived from the historically defined, limited nature and function of courts and from the recognition that, within the framework of our adversary system, the adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity.[3]

Ripeness determinations require balancing the need for present adjudication and the hardship of withholding review against the impact of contingency in making the issues unsuitable for review at this time.[4] That general rule is easy to state but difficult to apply as the United States Supreme Court recently observed: "the difference between an abstract question and a 'case or controversy' is one of degree . . . and is not discernible by any precise test."[5] Difficult as that exercise may be, it is one in which this court must engage; defendants are correct when they note that the case or controversy requirement is not a mere technicality.

Defendants contend that MPIRG does not allege a specific live grievance based on concrete facts but instead raises a hypothetical chain of events. Since MPIRG cannot point to any

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[2] "The role played by Article III limitations in implementing ripeness doctrine is so unclear that no attempt will be made to distinguish between jurisdictional and merely prudential constraints." 13 Wright & Miller, *Federal Practice & Procedure: Civil* § 3532 at 240 (1972 ed.).

[3] *Poe v. Ullman*, 367 U.S. 497, 503 (1961).

[4] 13 Wright & Miller, *supra*, note 2, at 238 (1972 ed. and 1981 pocket part).

[5] *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 297 (1979).

student who has actually been denied financial assistance under Title IV of the Higher Education Act of 1965, 20 U.S.C. §§ 1070-1089, for failure to meet the registration requirement, defendants argue, the suit is premature. Defendants cite the following contingencies:

1. a person required to register must fail to do so;
2. that person must apply for assistance or benefits under Title IV;
3. that person must be found otherwise eligible to receive such assistance or benefits;
4. that person, after notice of proposed denial and opportunity for a hearing, must fail to establish compliance with the registration requirement; and
5. that person must be denied assistance or benefits.

Until this sequence of events actually occurs, defendants claim, MPIRG presents only a nonjusticiable abstract and contingent question. Similarly, defendants contend that the intervenors do not allege a case or controversy for the same reasons.

The court is not persuaded by defendants' argument. "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974). In that case, plaintiffs challenged the constitutionality of the Regional Rail Reorganization Act of 1973, 87 Stat. 985, 45 U.S.C. §§ 701-794, alleging it worked an unconstitutional "taking" of property without due process. The district court had found the so-called "conveyance taking" issue not ripe for adjudication because the statutory scheme required several decisional steps before the final conveyance. The district court cited three possible contingencies,* one of which was resolved before the case reached the Supreme Court. The Supreme Court, however, found the issue ripe despite the two remaining alleged contingencies. It found, first, that im-

* The possibilities were that the reorganization court might determine under § 207(b) that the process was not fair and equitable to the railroad estate, or that Congress might disapprove the final plan under § 208(a), or that the Special Court would not order the final conveyance under § 303(h). The first possibility was eliminated before the case reached the Supreme Court. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974).

plementation of the Rail Act would lead "inexorably" to the final conveyance, although the exact date of that conveyance could not be presently determined. While it was true that Congress could reject the first reorganization plan presented, the court read the Rail Act to contemplate continued presentation of plans until one was approved. Thus, the court said, it must assume there would be compliance with the Act's mandatory terms at some time. *Id.* at 140.

Similarly, in the case at bar, defendants argue that the statutory scheme contemplates several steps before any student would be denied assistance or need to invoke the fifth amendment privilege against self-incrimination. Only after a student had first applied and second met eligibility requirements would he, under regulations not yet promulgated, probably be required to submit a certificate of compliance with registration requirements. Only then would a student face self-incrimination problems, defendants argue. Furthermore, assistance would not be denied until the above steps, as well as a notice of proposed denial, a hearing and a failure to cure the noncompliance, occurred.

Section 1113, however, by its terms imposes a mandatory system linking availability of financial aid to draft registration. Section 1113(f)(1) provides that any person required to register who fails to do so *shall be ineligible* for any form of assistance or benefit under Title IV. Subsection (2) provides that '[i]n order to receive any . . . assistance under Title IV [a person required to register] *shall file* . . . a statement of compliance with section 3 and regulations issued thereunder." Subsection (3) requires the Secretary of Education, in agreement with the Director of the Selective Service, to prescribe methods for verifying such statements and provides that the Secretary of Education "*shall issue* regulations to implement the requirements . . .." It must therefore be presumed that the Secretary will comply with the mandatory terms of Section 1113 and that implementation of the Section will lead inexorably to the denial of financial assistance, although the exact date of that denial cannot be presently determined.

The court in *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), also found that no court was empowered to prevent the final conveyance and thus the occurrence of the alleged tak-

ing was in no way hypothetical or speculative. *Id.* at 143. "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough" the court said, *id.* (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). In the case now before this court, there is also no provision for judicial review that would prevent the denial of assistance or the alleged burden on fifth amendment rights. Students should not have to risk denial of benefits or jeopardize their privilege against self-incrimination before they can seek judicial redress. If defendants' views were correct, no allegedly unconstitutional law could be challenged on its face. Instead, persons would have to wait until the allegedly unconstitutional law was applied to them, resulting in deprivation of their constitutional rights, before their challenge could be considered ripe. Such an approach would provide minimal protection, if any, to precious constitutional rights and clearly is not a correct interpretation of the law.[1]

Finally, the court in the *Regional Rail* found that, because of the structure of the Act, there was no better time to decide its constitutionality to minimize or prevent irreparable injury. Until the reorganization plan was finally developed, immediately before the challenged conveyance, the courts would not have any more settled facts. The conveyance's complexity and the long time lapse probable before valuation review in practical effect made the conveyance irreversible. The court believed it would be in no better position later than it was then to confront the provision's validity and instead found serious risks associated with delay. *Id.* at 144-45.

Similarly, since plaintiffs attack this statute as unconstitutional

[1] *See, e.g., Babbitt*, 442 U.S. at 301. In that case, plaintiffs challenged the constitutionality of several provisions of Arizona's farm labor statute. One provision specified procedures for election of employee bargaining representatives; plaintiff-appellees in the past admitted that they had not invoked the act's election procedures in the past and did not express any intent to do so in the future. Defendants-appellants said that the court should decline to entertain the challenge until appellees invoked the act's procedures, arguing that the court might thereby acquire information about how the procedures would actually operate in lieu of appellees' predictive evidence. The court observed that while waiting would "remove any doubt about the existence of concrete injury resulting from application of the election provision, little could be done to remedy the injury incurred . . .." *Id.* at 301 n.12.

on its face, this court will be in no better position to assess the statute's validity once it has been actually applied to individuals or even once regulations to implement that application have been promulgated. Furthermore, it would appear that the broad constitutional questions raised by a facial attack can be resolved without individualized facts. "The availability of broad constitutional grounds may mean that decision is possible with little individualized factual development."[8] There are no advantages in waiting until April or May of 1983 as defendants suggest. Rather, irreparable harm may occur if the court delays its review. Many students may forego financial assistance to avoid self-incrimination. Others may waive their privilege against self-incrimination by beginning the aid application process. "Ripeness may be found even though the plaintiff controls the happening of the contingent events whose occurrence would solidify the dispute."[9]

Therefore, the court concludes that both MPIRG and the intervening plaintiffs have raised a justiciable case or controversy: the issues are ripe for decision, more settled facts are unlikely to become available or to prove helpful in assessing the constitutionality of a statute allegedly invalid on its face, and, finally, withholding review creates the risk of irreparable harm to important constitutional rights.

II. Standing

Standing, like ripeness, involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise.[10] As with ripeness, it has not always been clear whether particular features of the standing requirement have been required by Article III or by the courts themselves.[11] At a minimum, Art. III requires that the party seeking to invoke the court's jurisdiction show that he or she has personally suffered some actual or threatened injury as a result of the defendant's putatively illegal conduct and that the injury be fairly traced to

[8] Wright & Miller, *supra*, note 2, at 244.

[9] *Id.* at 248. *See also* discussion criticizing *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), *id.* at 251.

[10] *Warth v. Seldin*, 422 U.S. 490, 498 (1974).

[11] *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982).

the challenged action as well as likely to be redressed by a favorable decision.[12] The Supreme Court recently recognized that: "Art. III . . . is not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the framers of the Constitution . . .." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 476 (1982).

The "injury in fact" that a party must demonstrate in order to have standing is not limited to economic harm.[13] At the same time, the injury in fact test requires more than an injury to some cognizable interest: it requires that the party seeking review be among the injured.[14] Standing analysis focuses on the party seeking to put his or her complaint before the court and not upon the issues the party wishes to have adjudicated.[15] Thus, "a mere 'interest in a problem' not matter how longstanding the interest and no matter how qualified the organization is in evaluating a problem, is not sufficient by itself . . ." to confer standing.[16] As the Supreme Court in *Valley Forge*, 454 U.S. at 486 noted, "[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy."

While a party seeking standing generally must allege injury to his or her own rights, the courts have long recognized that an association may have standing to assert the claims of its injured members even where the association itself has suffered no injury from the challenged activity.[17] The courts have not, however, created a per se rule granting an organization standing to sue on behalf of any of its members for any injury.[18] The requirements of "representational standing" were first explained by the Supreme Court in *Warth v. Seldin*, 422 U.S. 490 (1974), when it said:

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[12] *Id.* at 472.

[13] *United States v. SCRAP*, 412 U.S. 669, 686 (1973).

[14] *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1971).

[15] *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

[16] *Sierra Club*, 405 U.S. at 739.

[17] *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 342 (1977). *See also Warth v. Seldin*, 422 U.S. 490, 511 (1974); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1971); *National Motor Freight Assn. v. United States*, 372 U.S. 246 (1963); *NAACP v. Alabama*, 357 U.S. 449, 459 (1958).

[18] *O'Hair v. White*, 675 F.2d 680, 691 (5th Cir. 1982).

> The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Id. at 511. These same requirements were later clarified and set forth as a three-part test in *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977). There the court determined that an association has representational standing when:

1. its members would otherwise have standing to sue in their own right;

2. the interests it seeks to protect are germane to the organization's purpose; and

3. neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. By so limiting representational standing, the court has ensured that the constitutional and prudential restrictions on standing are applied to organizations as well as to individuals. The first requirement ensures that there has been some injury in fact to the party who appears, through its representative, in court. The second establishes that the representative appearing is entitled to represent the injured party on that particular matter. The third assures the court that allowing the parties to proceed in a representational capacity will not harm the individual interests allegedly protected by the representative.

With these general principles in mind, we turn now to the facts of this case. Plaintiff MPIRG does not allege that it has standing in its own right. Instead, it asserts only representative standing.[19] Thus, MPIRG's standing must be tested against the three-part test elucidated in *Hunt*. For purposes of ruling on defendants' motion for summary judgment based on lack of standing, we

[19] *See* MPIRG's Amended Complaint. In response to specific questions from the court at the hearing held January 10, 1983, MPIRG's attorney, Ms. Gail Suchman, confirmed that MPIRG sought *only* representational standing.

must accept as true all material allegations of the complaint and must construe the complaint in plaintiff's favor.[20] It is within the court's power to allow plaintiff to supply further particularized allegations of fact deemed supportive of plaintiff's standing and this the court has done by granting plaintiff leave to amend its complaint.[21] If, after this opportunity, plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed. *Warth v. Seldin*, 422 U.S. 490, 501-02 (1974).

Defendants contend that plaintiff MPIRG has failed to meet the *Hunt* test. First, defendants allege, MPIRG does not establish that its members would have standing to sue in their own right. In essence, defendants repeat their ripeness arguments, alleging that no MPIRG members have yet been denied assistance or compelled to file a statement of compliance. Therefore, defendants argue, no members have suffered "injury in fact" and no members would have standing to sue as individuals. Defendants propound a similar argument against the standing of the intervenors, claiming that they have not suffered actual injury and therefore have not met the "injury in fact" test. As the court has determined in its discussion of ripeness, Part I, *supra*, plaintiff's members are not required to submit to actual injury before being allowed to vindicate their rights. *Threatened* injury is firmly established as meeting the injury in fact test.[22] Therefore, both the intervenors and three individual MPIRG members would have standing to sue. As a result, MPIRG meets the first prong of the *Hunt* test.

Second, defendants allege, plaintiff has failed to establish that the membership interests MPIRG seeks to protect are germane to its purposes. Defendant notes that the original complaint and the amended complaint allege only that MPIRG is a "college student-directed non profit Minnesota corporation." There are no allegations about MPIRG's purposes, the qualifications, rights, and privileges of membership, about how membership interests are determined, or about whether the particular membership interests MPIRG seeks to protect are germane to its purposes. Even if the court considers plaintiff's statements in its

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[20] *Warth*, 422 U.S. at 501.

[21] Order dated January 24, 1983.

[22] *See, e.g., Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

memorandum in support of its motion for a preliminary injunction that MPIRG is "concerned with energy, environmental, consumer and other issues" and that "[m]any of the issues in which MPIRG has been involved directly relate to student concerns, such as landlord-tenant problems and financial aid,"[23] defendants contend that this self-description shows "MPIRG . . . to be an organization with the broadest of concerns, the 'public interest,' which seeks . . . to act as an advocate of a particular point of view which may 'relate' to 'student concerns' . . . ."[24]

Plaintiff, on the other hand, alleged in oral argument that its purposes are to examine and take positions on issues that affect the student community and that MPIRG's student-elected student board of directors voted unanimously to file this action. The implicit assumption is that such an organization is obviously concerned about potential denial of student financial aid. In a letter to the court following the hearing, MPIRG further clarified its purpose as stated in its articles of incorporation. Those purposes are "to promote the public interest and social welfare."[25] MPIRG also pointed to its "long-standing history of protecting the interests of students in many diversified areas in accordance with its broad mandate."[26] Finally, both in oral argument and in its letter, MPIRG observed that it had been granted standing as a representative of student rights previously in this district.[27]

In *Associated General Contractors v. Otter Tail Power Co.*, 611 F.2d 684 (8th Cir. 1979), the court of appeals of this circuit applied the *Hunt* factors. The case is particularly instructive. In *Associated General Contractors*, a nonprofit trade association (AGC) composed of 138 general contractors alleged that a stabilization agreement negotiated between the defendant power corporations and several labor unions covering all construction

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[23] Plaintiff's Memorandum in Support of its Motion for Preliminary Injunction, at 1.

[24] Defendants' Memorandum in Opposition to Plaintiff's Motion for Leave to Amend Complaint, at 5 n.3.

[25] Letter from E. Gail Suchman, attorney for MPIRG (January 13, 1983) at 1.

[26] *Id.*

[27] *See MPIRG v. Butz*, 498 F.2d 1314 (8th Cir. 1974); *MPIRG v. Gordon Johnson*, No. 4-72 Civ. 255 (D. Minn. Sept 22, 1982).

work on a power plant project violated state labor laws and federal antitrust laws. The district court dismissed on the grounds that the association lacked standing, both on its own behalf and in a representational capacity. While the circuit court felt the district court erred in requiring the association to show compelling need before it could sue as its members' representative, the circuit court did agree with the trial court's result. The court found that determining whether representational standing was available in a § 16 Clayton Act action depended, as in other types of actions, on an analysis of the *Hunt* factors.

The circuit court said initially that each of the three *Hunt* requirements must be met. It found it doubtful that AGC met any of them, but found it certain that the second and third requirements were not met.[28] In determining whether the interests AGC sought to protect were germane to its purposes, the court first identified the interest to be protected as the right of each member willing to work on the project to do so without having to sign a collective bargaining agreement and without having to pay wages and fringe benefits equal to minimum standards.[29] The stated purposes of AGC were to promote fair competition, improve labor conditions and eliminate unfair and unethical practices in the construction industry.[30] The court next noted that:

> Neither the complaint nor the affidavits enlighten us as to how these interests are germane to the organization's purposes. There is no allegation, express or implied, that restraining enforcement of the Stabilization Agreement will in any way improve labor conditions, eliminate unfair or unethical practices or promote fair competition. Nor is there anything in the affidavits that would tend to flesh out the

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[28] *Associated General Contractors v. Otter Tail Power Co.*, 611 F.2d 684, 690 (8th Cir. 1979).

[29] The agreement provided that signatory unions were the sole bargaining representatives for certain classes of manual employees on designated job sites; that contractors on the project should fill job vacancies by a registration and referral system established by each of the unions, when such procedures did not violate federal law; and that subcontractors on the project must be a party to a collective bargaining agreement with a lawful union that provided for wages, hours and other terms of employment meeting the minimum standards set in the agreement. *Id.* at 686-87.

[30] *Id.* at 686.

allegations to show that enforcement of the agreement would interfere with the achievement of any of the stated purposes.

Associated General Contractors v. Otter Tail Power Co., 611 F.2d 684, 691 (8th Cir. 1979).

Viewing the pleadings in the light most favorable to plaintiff, the court is convinced that plaintiff MPIRG has not shown it seeks to protect interests germane to its purpose. Plaintiff makes no allegation in its complaint, amended complaint, or affidavits of its purposes. Even when we look to plaintiff's memorandum, oral argument, and correspondence for evidence of its purposes, we find an organization concerned with the broad "public interest and social welfare." It may be true that many of the issues MPIRG has been involved with relate to "student concerns" and that it is an organization primarily but not wholly funded by students. Its purposes, however, are not solely limited to research and debate on issues that affect students as students. Instead, its very broad mandate shows that is concerned like any other public interest group with issues that affect its members, most of whom are students, as citizens.[11] Under MPIRG's conception of its purposes, the court can think of few cases or issues where MPIRG would not have standing.

The cases that have granted MPIRG standing in this district are inappropriate, this court believes, because they predate the clarification of representational standing by the Supreme Court in *Hunt* and the Eighth Circuit's opinion in *Associated General Contractors*. Under the *Hunt* test, MPIRG would most likely not have standing, for example, to challenge logging in the BWCA simply because 34 of its members had used the BWCA and planned to continue such use.[12] As another district court explained, "[T]he association's representative capacity will seldom, if ever,

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[11] Membership in MPIRG is never defined although the court assumes that 40,000 plus students who have paid fees comprise most or a large portion of the membership.

[12] *MPIRG v. Butz*, 358 F. Supp. 584, 597 (D. Minn. 1973), *aff'd*, 498 F.2d 1314 (8th Cir. 1974). *Compare United States v. SCRAP*, 412 U.S. 669, 678 (1973), where the association's "primary purpose [was] to enhance the quality of the human environment . . ." and the members claimed harm resulting from adverse environmental impact.

extend to all of its members' interests. A local PTA, for example, cannot be expected to represent its members in matters not relating to education.'"[13]

The Eighth Circuit in *Associated General Contractors* found that a contractors' trade association whose purposes included promotion of fair competition, improved labor conditions, and elimination of unethical practices in the industry did not have standing to challenge an agreement that allegedly forced its members (half of whom were nonunion) into collective bargaining relationships in restraint of competition. The court looked to the complaint and affidavits for some express or implied allegation that would connect the organization's purposes and the interests it sought to protect in a representational capacity. Finding no such allegations, it held that the second *Hunt* element was not met.

Similarly, we can find nowhere in plaintiff's complaint, amended complaint, oral argument, or even its briefs and letter to the court any explanation of how the interests it seeks to protect (presumably the interest in availability of financial aid without allegedly unconstitutional restrictions)[14] are germane to its broad public interest purpose. The Supreme Court in *Valley Forge* observed that, "This Court repeatedly has rejected claims of standing predicated on 'the right, possessed by every citizen, to require that the Government be administered according to law . . ..' Such claims amount to little more than attempts 'to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government.' "[15] We therefore conclude that plaintiff MPIRG has failed to meet the second requirement for representational standing.

Finally, defendants allege, plaintiff has failed to meet the third requirement because it has not shown that participation of individual members is not necessary. Defendants contend that there is a diversity of view among MPIRG members about the registration requirement and they note that 97.56 percent of all persons required to register in Minnesota have done so. In addition to this

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[13] *Boyce v. Rizzo*, ;78 FRD 698, 704 (E.D. Pa. 1978) (finding second element of *Hunt* met).

[14] MPIRG never explicitly identifies the interests it seeks to protect.

[15] 454 U.S. 464, 482-83(1982) (citations omitted).

ideological diversity of view, defendants allege that there is a financial conflict of interest among MPIRG members about this suit. Defendants reason that more Title IV money will be available to eligible students if those who fail to register become ineligible. Therefore, it is in the financial interest of many MPIRG members to defend the Act's constitutionality.

Plaintiff acknowledges that there is a diversity of view among its members but claims that such diversity is unimportant in light of the unanimous decision of the duly elected student board of directors to file this suit.[16] Furthermore, those who may not be declared ineligible (for example, women) may not necessarily support the statute; therefore, the alleged diversity of view may not be great.

The Eighth Circuit in *Associated General Contractors* found that the association had failed to meet the third element of the *Hunt* test because the asserted claim required the participation of individual members. The court found that the association was clearly not in a position to speak for its members on the issue:

> Their status and interests are too diverse and the possibilities of conflict too obvious to make the association an appropriate vehicle to litigate the claims of its members . . .. Some members are not qualified and others are not willing to work on the project; some stand to benefit from working on the project under the Agreement and still others will be hurt by not being able to do so.

611 F.2d 684, 691 (8th Cir. 1979).

The Eighth Circuit has construed *Hunt* quite strictly. The United States District Court of Maryland, in a similar case, has said that "[t]he third prong of the *Hunt* test involves two considerations: (1) whether the nature of the claims involves individualized proof," citing *Hunt* and "(2) whether the association is competent to speak for its members," citing *Associated General.*[17] The Maryland court then analyzed defendants' contention that the plaintiffs' members' interests were too diverse to

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[16] *See* Letter from E. Gail Suchman (January 13, 1983) and statements at oral argument, January 10, 1983.

[17] *National Contractors Assoc. v. National Electrical Contractors Assoc., Inc.*, 498 F. Supp. 510, 521 (1980).

be represented by the association. The court specifically declined to follow what it termed the Eighth Circuit's lead and implied that evidence that some members would actually *benefit* from the challenged provision, rather than evidence that some members did not feel *harmed* by it, would be required before the Maryland court would find the dissenting members' individual participation necessary. The Eighth Circuit thus appears fairly ready to find that a diversity of view necessitates individualized participation, preventing representational standing.

The Tenth Circuit expressed a similar concern when faced with an association seeking representational standing whose members allegedly possessed diverse views.[18] The court noted that many of the member colleges might not support the NCAA's effort to overturn regulations that would put women's intercollegiate sports on a par with men's because many of the members belonged to a women's intercollegiate sports association, the AIAW, that was on the other side of the litigation. If unofficial contingents of the members were seen cheering both sides of the litigation, the court said, there would be no "case or controversy."

> We hold that when an association does not have standing in its own right, and it is not clear which side of the lawsuit the association's members would agree with, one or more members must openly declare their support of the association stance, and they must do so through those officials authorized to bring suit on their behalf. Moreover, if more members of the association declare *against* the association's position than declare in favor of it, the association does not have standing, for then the parties in the lawsuit most likely would not be adverse.

National Collegiate Athletic Association v. Califano, 622 F.2d 1382, 1391-92 (10th Cir. 1980). Since members were formally advised by the council of the possible necessity for the suit and voted to adopt the report containing such advice, however, the court found that the association had representational standing.[19]

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[18] *National Collegiate Athletic Association v. Califano*, 622 F.2d 1382 (10th Cir. 1980).

[19] The Tenth Circuit dealt with the diversity of view problem in its analysis of the second, as opposed to the third, *Hunt* requirement.

The United States Supreme Court has also found that an association lacked representational standing because of its members' diversity of view.[40]

The court concludes that the claim asserted by plaintiff MPIRG requires the participation of its individual members. As in *Associated General Contractors*, the status and interests of the members are diverse. Their only common tie is that they are students. Students, like other segments of the population, may have diverse views on the propriety of linking financial aid to draft registration. MPIRG concedes this diversity exists.[41] Some of the members may not want financial aid; others may not qualify for it even absent the challenged provisions. Many of the members, for example men outside the registration age bracket or women, are not subject to the provision; others may be subject to the registration requirements but may still support the provision. While it is not clear to the court that some members will actually benefit from the provision via increased aid as defendants contend, it is clear that some members will not be harmed by experiencing either denial of financial assistance or burdens on their fifth amendment rights. The court finds *Associated General Contractors* controlling and, as in that case, finds that MPIRG is clearly not in a position to speak for its members on this issue. Therefore, plaintiffs have failed to meet the third requirement of representational standing.

Plaintiff MPIRG lacks standing to bring this suit because, first, it has failed to show that the interests it seeks to protect are germane to its purposes and, second, the claim asserted is one that requires the participation of individual members. Therefore, defendants' motion for summary judgment as to MPIRG will be granted. Pursuant to Fed. R. Civ. P. 54(b), the court finds that there is no just reason for delaying the entry of judgment as against the plaintiff MPIRG.

Dismissal of the plaintiff MPIRG, however, does not require dismissal of the intervening plaintiffs. If there is an independent

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[40] *Harris v. McRae*, 448 U.S. 297, 321 (1980). This case arguably is distinguishable because it involved a free exercise claim which ordinarily requires individual participation to show the statute's impact on the individual's exercise of his or her religion.

[41] Statements of E. Gail Suchman, attorney for MPIRG, at oral argument, January 10, 1983.

basis for the intervenors' jurisdiction, the court has discretion to treat their pleading as a separate action in order to adjudicate their claims.[42] The court may exercise this discretion where it appears that failure to adjudicate the claim will only result in unnecessary delay.[43] The court has ruled that the intervenors have standing and that the issue they seek to raise is ripe. They clearly allege federal question jurisdiction. By allowing the action to continue with respect to the intervenors, the court can avoid the senseless "delay and expense of a new suit, which at long last [would] merely bring the parties to the point where they now are." *Hackner v. Guaranty Trust Co.*, 117 F.2d 95, 98 (2d Cir. 1941).

Upon the foregoing,

IT IS ORDERED That defendants' motion for judgment on the pleadings, treated pursuant to Fed. R. Civ. P. 12(c) as a motion for summary judgment, as against plaintiff MPIRG be and hereby is granted.

IT IS FURTHER ORDERED That the clerk enter judgment as follows:

> IT IS ORDERED, ADJUDGED AND DECREED That the Complaint of plaintiff Minnesota Public Interest Research Group (MPIRG) be and the same hereby is dismissed for lack of standing.

DATED: January 24, 1983.

/s/ Donald D. Alsop
DONALD D. ALSOP
United States District Judge

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[42] *See McKay v. Heyison*, 614 F.2d 899 (3d Cir. 1980); *Miller & Miller Auctioneers, Inc. v. G. W. Murphy Industries, Inc.*, 472 F. 2d 893, 895-96 (10th Cir. 1973); *Atkins v. State Board of Education*, 418 F.2d 874 (4th Cir. 1969); *Fuller v. Volk*, 351 F.2d 323 (3d Cir. 1965); *Hackner v. Guaranty Trust Co.*, 117 F.2d 95 (2d Cir. 1941), *cert. denied*, 313 U.S. 559; *Corporation Venezolana de Fomento v. Vintero Sales Corp.*, 477 F. Supp. 615, 622 (S.D.N.Y. 1979); *Pikor v. Cinerama Prods. Corp.*, 25 F.R.D. 92 (S.D.N.Y. 1960); *Truncale v. Universal Pictures Co.*, 76 F. Supp. 465 (S.D.N.Y. 1948); 7A Wright & Miller, *Federal Practice & Procedure: Civil* § 1917 at 586 (1972 ed. and 1981 pocket part).

[43] *Miller & Miller Auctioneers, Inc. v. G. W. Murphy Industries, Inc.*, 472 F.2d 893, 896 (10th Cir. 1973).

EXHIBIT A

ENFORCEMENT OF MILITARY SELECTIVE SERVICE ACT

SEC. 1113. (a) Section 12 of the Military Selective Service Act (50 U.S.C. App. 462) is amended by adding after subsection (e) the following new subsection:

"(f)(1) Any person who is required under section 3 to present himself for and submit to registration under such section and fails to do so in accordance with any proclamation issued under such section, or in accordance with any rule or regulation issued under such section, shall be ineligible for any form of assistance or benefit provided under title IV of the Higher Education Act of 1965.

"(2) In order to receive any grant, loan, or work assistance under title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.), a person who is required under section 3 to present himself for and submit to registration under such section shall file with the institution of higher education which the person intends to attend, or is attending, a statement of compliance with section 3 and regulations issued thereunder.

"(3) The Secretary of Education, in agreement with the Director, shall prescribe methods of verifying such statements of compliance filed pursuant to paragraph (2). Such methods may include requiring insitutions of higher education to provide a list to the Secretary of Education or to the Director of persons who have submitted such statements of compliance.

"(4) The Secretary of Education, in consultation with the Director, shall issue regulations to implement the requirements of this subsection. Such regulations shall provide that any person to whom the Secretary of Education proposes to deny assistance or benefits under title IV for failure to meet the registration requirements of section 3 and regulations issued thereunder shall be given notice of the proposed denial and shall have a suitable period (of not less than thirty days) after such notice to provide the Secretary with information and materials establishing that he has complied with the registration requirement under section 3. Such regulations shall also provide the Secretary may afford such person an opportunity for a hearing to establish his compliance or for any other purpose."

(b) The amendment made by subsection (a) shall apply to loans, grants, or work assistance under title IV of the Higher Education Act for periods of instruction beginning after June 30, 1983.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

MINNESOTA PUBLIC INTEREST RESEARCH GROUP (MPIRG),

Plaintiff,

v.

SELECTIVE SERVICE SYSTEM, Major-General Thomas K. Turnage, Director; and UNITED STATES DEPARTMENT OF EDUCATION, Terrel H. Bell, Secretary,

Defendant.

3-82 Civ. 1670

ORDER

E. GAIL SUCHMAN, Esq. and DANIEL W. LASS, Esq., Minneapolis, Minnesota, appeared for plaintiff.

NEIL H. KOSLOWE, Esq., Department of Justice, Washington, D.C., appeared for defendants.

This matter comes before the court upon plaintiff's "Motion for Reconsideration of Judgment and Motion for Leave to Amend Complaint." The motion recites that it is made pursuant to Rule 59(e) of the Fed. R. Civ. P. to have the court "reconsider the portion of its judgment in this action dated January 24, 1983, dismissing plaintiff for lack of standing, and to thereby alter or amend such judgment." Plaintiff further requests that "plaintiff's Second Amended Complaint. . . be entered by this court, pursuant to Fed. R. Civ. P. Rule 15(a) and 15(b)."

As part of the motion, plaintiff has submitted to the court a memorandum and has filed with the clerk a "Second Amended Complaint for Declaratory Judgment and Injunctive Relief." Plaintiff has also filed an Affidavit of Lawrence McDonough, dated February 1, 1983.

The plaintiff Minnesota Public Interest Research Group (MPIRG) commenced this action with the filing of its original complaint on November 23, 1982. On December 17, 1982, the defendants served their answer upon counsel for plaintiff and on that date is was filed with the clerk. The "First Defense" asserted in the answer as served and filed alleged that "Plaintiff lacks standing to bring this lawsuit." Simultaneously with the filing of the answer, defendants filed a motion for judgment on the pleadings asserting, among other things, that under the allegations of the original complaint, the plaintiff had failed to demonstrate standing.

In direct response to the defendants' motion for judgment on the pleadings, the plaintiff, on December 20, 1982, noticed a motion for leave to file an amended complaint. In paragraph 3 of that motion, counsel for plaintiff set forth as one of the reasons for the motion, the following:

> Defendants have addressed the issue of plaintiff's standing and capacity to sue in the instant action in their memorandum in support of their motion for judgement on the pleadings. Entry of the amended complaint will contribute to the resolution of such issue.

On January 10, 1983, oral argument was had on, among other matters, defendants' motion to dismiss for lack of standing and plaintiff's motion for leave to file an amended complaint. On

January 25, 1983, the court entered its order granting plaintiff's motion for leave to amend its complaint, and such amended complaint stands as the complaint in the action. On the same date, the court entered its order granting defendants' motion for judgment on the pleadings as against the plaintiff MPIRG, and directed the clerk to enter judgment of dismissial of MPIRG for lack of standing. It is this order that the plaintiff MPIRG now asks the court to "reconsider."

In issuing its order of January 24, 1983, the court treated defendants' motion for judgment on the pleadings as a motion for summary judgment pursuant to Fed. R. Civ. P. 12(c) because matters outside the pleadings were presented to and considered by the court. The court allowed plaintiff to supply further particularized allegations of fact in support of plaintiff's standing by granting plaintiff leave to amend its complaint. In addition, the court accepted as true all material allegations of the amended complaint and construed the amended complaint in plaintiff's favor. In considering the motion, the court also considered the affidavit of E. Gail Suchman dated December 10, 1982, the factual representations on MPIRG's standing made in MPIRG's "response in opposition to defendants' motion for judgment on the pleadings," and plaintiff's "reply to defendants' opposition to plaintiff's motion for a preliminary injunction." The court also considered factual representations made by MPRIG's counsel during oral argument on January 10, 1983 and factual representations concerning MPIRG's standing contained in a letter dated January 13, 1983 from MPIRG's counsel.

Although the motion currently before the court is deemed one for "reconsideration," the motion is in fact one to reopen the entire record and present the matter to the court on entirely new and different facts. Additional affidavits and documentary material are attached to the motion papers together with a verified "Second Amended Complaint." All of this material was available to plaintiff's counsel before this action was commenced, before its motion for leave to file an amended complaint, and before this court's order of January 24, 1983.

Rule 59(e) is not intended to permit a nonprevailing litigant to reopen the entire proceedings at its own whim. The court afforded to the plaintiff every opportunity to present to the court any and all information it deemed appropriate to the issue of standing

prior to the resolution of the issue by the court. The issue of standing should not now be litigated by this or any other court on the basis of a new record consisting of the additional materials now offered. The same will be stricken from the record.

The motion for a second amended complaint is equally without merit. The plaintiff already has been afforded the opportunity to amend its complaint for the precise purpose of addressing the issue of standing. This opportunity was afforded prior to the court's ruling on that issue. The rules of court do not require nor do the interests of justice dictate that plaintiff have that opportunity once again.

Upon the foregoing,

IT IS ORDERED That the motion of the plaintiff for reconsideration of this court's order of January 24, 1983 is in all things denied.

IT IS FURTHER ORDERED That the affidavit and materials submitted in support thereof have not previously and do not now constitute a portion of the record in these proceedings.

IT IS FINALLY ORDERED That the plaintiff's motion for leave to file a "Second Amended Complaint" is denied, and the proposed Second Amended Complaint does not and shall not constitute a part of the record in these proceedings.

DATED: March 16, 1983

/s/ Donald D. Alsop
DONALD D. ALSOP
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

MINNESOTA PUBLIC INTEREST RESEARCH GROUP (MPIRG),

Plaintiff,

and

JOHN DOE, RICHARD ROE, and PAUL POE,

Intervening Plaintiffs,

v.

CIVIL ACTION NO. 3-82-1670

JUDGE DONALD D. ALSOP

SELECTIVE SERVICE SYSTEM, Major-General Thomas K. Turnage, Director; and UNITED STATES DEPARTMENT OF EDUCATION, Terrel H. Bell, Secretary,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that the Minnesota Public Interest Research Group, Plaintiff named above, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment dismissing Plaintiff for lack of standing, entered in this action on the 24th day of January, 1983 [on which a motion under Rule 59 of the Federal Rules of Civil Procedure was denied on March 16, 1983], and from the decision denying Plaintiff's motion for leave to amend its Complaint, entered on the 16th day of March, 1983.

MINNESOTA PUBLIC
INTEREST RESEARCH
GROUP

/s/ E. Gail Suchman
E. GAIL SUCHMAN

/s/ James D. Miller
JAMES D. MILLER

2412 University Avenue
Southeast
Minneapolis, Minnesota 55414
(612) 376-7554

Dated: May 13, 1983

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1662

Minnesota Public Interest
Research Group (MPIRG)

Appellant,

John Doe; Richard Roe;
Paul Poe
v.

Selective Service System,
Major-General Thomas K.
Turnage, Director, and
United States Department
of Education, Terrel H. Bell,
Secretary,

Appellees.

Appeal from the United
States District Court
for the District of
Minnesota

AMICUS CURIAE for appellant

New York Public Interest
Research Group

Filed: August 17, 1983

Before HEANEY, ROSS, and ARNOLD, Circuit Judges.

ORDER

The government moves to dismiss the instant appeal in this court and transfer the appeal to the United States Supreme Court. Examination of the record shows the district court held Section 1113 of the Department of Defense Authorization Act of 1983 unconstitutional and the government has appealed to the Supreme Court, which has exclusive jurisdiction under 28 U.S.C. § 1252.[1] We thus grant the government's motion and transfer the instant appeal to the Supreme Court of the United States.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

---

[1] Section 1252 provides,

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such office or employee, is a party.
>
> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

Office-Supreme Court, U.S.
FILED
NOV 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-637

In the Supreme Court of the United States

OCTOBER TERM, 1983

MINNESOTA PUBLIC INTEREST RESEARCH GROUP,
APPELLANT

v.

SELECTIVE SERVICE SYSTEM, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MOTION TO AFFIRM

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

NEIL H. KOSLOWE
Special Litigation Counsel

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over this appeal under 28 U.S.C. 1252.

2. Whether the district court properly dismissed appellant for lack of standing.

3. Whether the district court abused its discretion in denying appellant leave to file a second amended complaint.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statutes involved 2

Statement 2

Argument 7

A. The court of appeals correctly transferred the appeal to this Court under 28 U.S.C. 1252 7

B. The district court correctly concluded that appellant lacked standing 9

C. The district court did not abuse its discretion in denying appellant leave to file a second amended complaint 12

D. If this Court declines to affirm summarily, it should defer acting on the jurisdictional statement until it rules on the merits of the underlying action in *Selective Service System* v. *Minnesota Public Interest Group*, No. 83-276 13

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Associated General Contractors v. *Otter Tail Power Co.*, 611 F.2d 684 ..... 10, 11

Beneficial Finance of Kansas, Inc. v. *United States*, dismissed as moot, No. 81-583 (Dec. 13, 1982) 14

Boyce v. *Rizzo*, 78 F.R.D. 698 10

Page

Cases—Continued:

California Bankers Ass'n v. *Shultz*, 416 U.S. 21 10

Doe v. *Bolton*, 410 U.S. 179 13

FHA v. *The Darlington, Inc.*, 352 U.S. 977 14

Harris v. *McRae*, 448 U.S. 297 11

Health Research Group v. *Kennedy*, 82 F.R.D. 21 10

Hunt v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333 ..... 3, 9, 10, 11

National Collegiate Athletic Association v. *Califano*, 622 F.2d 1382 11

Sierra Club v. *Morton*, 405 U.S. 727 9

Warth v. *Seldin*, 422 U.S. 490 ..... 9, 10

Williams v. *Zbaraz*, 448 U.S. 358 14

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 401 U.S. 321 12

Constitution, statutes and rules:

U.S. Const. :

Art. III 10, 11

Amend. V 3

Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, § 1113, 96 Stat. 748 ..... 2, 3, 12, 13, 14

Page

Constitution, statutes and rules—Continued:

Higher Education Act of 1965, Title IV, 20 U.S.C. (& Supp. V) 1070 *et seq.* 2

Military Selective Service Act, 50 U.S.C. App. (Supp. V) 453 ..... 2, 3

Privacy Act of 1974, 5 U.S.C. 552a *et seq.* 14

28 U.S.C. 1252 ..... 2, 7, 8, 9, 13, 14

Fed. R. Civ. P. :

Rule 12(c) 3
Rule 54(b) 3, 8
Rule 23(a)(3) 10
Rule 23(a)(4) 10

Miscellaneous:

R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 8

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-637

MINNESOTA PUBLIC INTEREST RESEARCH GROUP,
APPELLANT

v.

SELECTIVE SERVICE SYSTEM, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MOTION TO AFFIRM

The Solicitor General, on behalf of the Selective Service System, *et al.*, moves under Rule 16.1 of the Rules of this Court that the decision of the district court be affirmed.

OPINIONS BELOW

The opinion of the district court dismissing appellant for lack of standing (J.S. App. 1a-20a) is reported at 557 F. Supp. 925. The opinion of the district court denying appellant's motion for reconsideration (J.S. App. 21a-24a) is not reported. The order of the court of appeals dismissing appellant's appeal for lack of jurisdiction and transferring the appeal to this Court (J.S. App. 27a-28a) is not reported.

JURISDICTION

The judgment of the district court was entered on January 24, 1983. A motion for reconsideration was denied (J.S. App. 21a-24a) on March 16, 1983. A notice of appeal to the court of appeals (J.S. App. 25a-26a) was filed on May 13,

1983. The order of the court of appeals dismissing the appeal for lack of jurisdiction and transferring it to this Court (J.S. App. 27a-28a) was entered on August 17, 1983. On September 19, 1983, Justice Blackmun granted appellant until October 3, 1983, to file a jurisdictional statement. The appeal was docketed as of September 30, 1983. This Court has jurisdiction under 28 U.S.C. 1252.

STATUTE INVOLVED

28 U.S.C. 1252 provides:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

STATEMENT

1. On November 23, 1982, appellant, a "college student-directed, non-profit Minnesota Corporation" (Complaint 3), filed this action to enjoin the operation of Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748. Section 1113 renders ineligible for aid under Title IV of the Higher Education Act of 1965 (20 U.S.C. (& Supp. V) 1070 *et seq.*) any person who fails to register as required by the Military Selective Service

Act, 50 U.S.C. App. (Supp. V) 453. It also requires applicants for aid to file with their schools a statement of compliance with the Selective Service Act. Appellant contended that Section 1113 is a bill of attainder and violates the Fifth Amendment. Appellees moved for judgment on the pleadings, arguing that appellant lacked standing.

Appellant was granted leave to amend its complaint. The amendment added allegations that appellant's membership included males, subject to the registration requirement of the Selective Service Act, who would be denied financial aid under the Higher Education Act unless enforcement of Section 1113 were enjoined (Amended Complaint paras. 14-15). The district court also granted leave to three anonymous students (John Doe, *et al.*) to intervene as plaintiffs. *MPIRG* v. *Selective Service System*, 557 F. Supp. 923 (D. Minn. 1983).

2. Pursuant to Fed R. Civ. P. 12(c) the district court treated the government's motion as one for summary judgment, and on January 24, 1983, dismissed appellant from the action for lack of standing (J.S. App. 1a-20a). The court directed the immediate entry of final judgment against appellant (J.S. App. 17a-18a). See Fed. R. Civ. P. 54(b). The court ruled that the John Doe intervenors had standing, however, and the action proceeded in their names (J.S. App. 17a-18a).[1]

In deciding that appellant had no standing to sue as a representative of its members the district court applied the test announced by this Court in *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).[2]

---

[1]On January 26, 1983, three anonymous students represented by appellant as counsel (Bradley Boe, *et al.*) filed a separate action making essentially the same allegations as the John Doe intervenors. The two actions were informally consolidated by the district court.

[2]Appellant did not allege that it had standing to sue in its own right (J.S. App. 9a).

Under that test an association has standing to sue on behalf of its members if (1) the members would have standing to sue in their own right, (2) the interests the association seeks to protect are germane to its purposes, and (3) neither the claim asserted nor the relief requested requires the participation of individual members. The court concluded that appellant had failed to show that the interests it sought to protect were germane to its purposes, or that the participation of individual members was not required (J.S. App. 13a-17a).

In deciding the question of germaneness, the court examined appellant's original complaint, amended complaint, supporting affidavits, legal memoranda, oral argument, and extra-record correspondence to the court, and found that appellant's purpose was " 'to promote the public interest and social welfare' " (J.S. App. 11a, 13a). The court said this "very broad mandate" showed that appellant was "concerned like any other public interest group with issues that affect its members, most of whom are students, as citizens" rather than simply with "issues that affect students as students" (*id.* at 13a; footnote omitted). Although the court assumed that appellant sought to protect an "interest in availability of financial aid without allegedly unconstitutional restrictions," it found "nowhere in plaintiff's complaint, amended complaint, oral argument, or even its briefs and letter to the court any explanation of how the interests it seeks to protect * * * are germane to its broad public interest purpose" (*id.* at 14a). Rather, the court concluded, appellant was attempting " 'to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government' " (*ibid.*).

With respect to the question of individual participation, the district court noted that "[m]embership in MPIRG [was] never defined" by appellant, although it appeared that some 40,000 students had paid fees to the group (J.S.

App. 13a n.31). The court found that "the status and interests of the [student] members are diverse," and "[t]heir only common tie is that they are students" (*id.* at 17a). The court noted that "[s]tudents, like other segments of the population, may have diverse views on the propriety of linking financial aid to draft registration," and that "MPIRG concedes this diversity exists" (*ibid.*; footnote omitted). "Some of the members may not want financial aid; others may not qualify for it even absent the challenged provisions. Many of the members, for example men outside the registration age bracket or women, are not subject to the provision; others may be subject to the registration requirements but may still support the provision" (*ibid.*). Also, "some members will not be harmed by experiencing either denial of financial assistance or burdens on their fifth amendment rights" (*ibid.*). Accordingly, the court ruled, "MPIRG is clearly not in a position to speak for its members on this issue" (*ibid.*).

3. On February 1, 1983, appellant moved for reconsideration of the district court's order of dismissal, and for leave to file a second amended complaint. The court denied the motion on March 16, 1983 (J.S. App. 21a-24a).

The court stressed that it had "afforded to the plaintiff every opportunity to present to the court any and all information it deemed appropriate to the issue of standing prior to the resolution of the issue by the court" (J.S. App. 23a-24a). It had "allowed plaintiff to supply further particularized allegations of fact in support of plaintiff's standing by granting plaintiff leave to amend its complaint"; it had "accepted as true all material allegations of the amended complaint and construed the amended complaint in plaintiff's favor"; it had "considered the affidavit of E. Gail Suchman dated December 10, 1982, the factual representations on MPIRG's standing made in MPIRG's 'response in opposition to defendants' motion for judgment on the

pleadings,' and plaintiff's 'reply to defendants' opposition to plaintiff's motion for a preliminary injunction' "; and it had "considered factual representations made by MPIRG's counsel during oral argument on January 10, 1983 and factual representations concerning [appellant's] standing contained in a letter dated January 13, 1983 from MPIRG's counsel" (*id.* at 23a). The additional material which appellant sought to present on reconsideration was "available to plaintiff's counsel before this action was commenced, before its motion for leave to file an amended complaint, and before this court's order of January 24, 1983" (*ibid.*).

The court concluded that appellant was in fact attempting "to reopen the entire record and present the matter to the court on entirely new and different facts" (J.S. App. 23a). Since it had already granted appellant leave to amend its complaint "for the precise purpose of addressing the issue of standing," the court held that "[t]he issue of standing should not now be litigated by this or any other court on the basis of a new record consisting of the additional materials now offered" (*id.* at 24a).

4. Appellant filed a notice of appeal to the Eighth Circuit on May 13, 1983 (J.S. App. 25a-26a). On June 16, 1983, before any briefs were filed in the court of appeals, the district court issued final judgments in the underlying action prosecuted by the intervening plaintiffs and the companion action prosecuted by the Bradley Boe plaintiffs (83-276 J.S. App. 38a-41a). The court held Section 1113 unconstitutional and enjoined its enforcement (83-276 J.S. App. 31a-37a). The next day the government moved in both actions for a stay pending direct appeal to this Court.[3] The government filed notices of appeal on June 21, 1983, and June 27, 1983 (83-276 J.S. App. 42a-45a).

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[3]The district court denied a stay, but this Court granted a stay on June 29, 1983.

Though it was aware that the government was appealing the district court's final decision in this action directly to this Court, appellant on June 24, 1983 filed a brief on the standing issue in the court of appeals. On July 19, 1983, the government moved in the Eighth Circuit to dismiss the appeal in that court for lack of jurisdiction, arguing that under 28 U.S.C. 1252 the appeal should be deemed taken directly to this Court.

On August 17, 1983, the court of appeals granted the government's motion and transferred the appeal to this Court (J.S. App. 27a-28a). It ruled that since the district court had held Section 1113 unconstitutional in the underlying action, and since the government had appealed directly to this Court, this Court had "exclusive jurisdiction" of the appeal under 28 U.S.C. 1252 (J.S. App. 28a).

ARGUMENT

Notwithstanding the explicit language of 28 U.S.C. 1252 appellant contends that the court of appeals, and not this Court, has jurisdiction over its appeal. Appellant also argues that the district court misapplied settled principles of standing law, and abused its discretion in refusing to permit appellant to amend its complaint a second time. These contentions are without merit.

A. The Court Of Appeals Correctly Transferred The Appeal To This Court Under 28 U.S.C. 1252

Whenever notice of direct appeal to the Supreme Court is filed under 28 U.S.C. 1252, "[a]ll appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court." This unambiguous language means what it says. "Any prior appeal already lodged in a court of appeals, whatever the issue, is to be transferred to the [Supreme] Court upon the filing and

service of a notice of appeal under § 1252." R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978). The purpose of this provision is "to avoid splitting the case or the issues as between the [Supreme] Court and the lower appellate court" (*ibid.*).

The Eighth Circuit thus correctly transferred appellant's appeal to this Court. Although appellant was dismissed for lack of standing, the underlying action was prosecuted to a conclusion by the remaining intervening plaintiffs.[4] When the government filed notice of direct appeal in the underlying action under 28 U.S.C. 1252, the court of appeals was bound to transfer to this Court the prior appeal lodged there by appellant.[5]

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[4]Appellant appears to suggest (J.S. 5-6) that the last sentence of 28 U.S.C. 1252 does not apply to appeals taken from dismissals under Fed. R. Civ. P. 54(b) (Judgment Upon Multiple Claims or Involving Multiple Parties). It is difficult to see why that should be so. The language of that sentence certainly encompasses Rule 54(b) appeals. It says that "*[a]ll* appeals * * * taken to other courts *prior to* * * * notice [of appeal under this Section] shall be treated as taken directly to the Supreme Court" (emphasis added). Moreover, the policy of Section 1252 against splitting cases between appellate courts can be as relevant to Rule 54(b) appeals as to others. For example, if the standing of the individual plaintiffs were an issue in this Court, it would be economical to consider appellant's standing together with that question—both because the standing issues would have much in common, and because it might be possible to reach the merits only in appellant's case. It is true, as we note below (pages 13-14), that the Rule 54(b) appeal will not always be so intertwined with the main case. But the same is true of many issues (*e.g.*, denial of class certification, award of attorney's fees) not necessarily appealable under Rule 54(b), but that are brought to this Court along with the constitutional question under Section 1252.

[5]Appellant complains that this result was achieved by "[a]ctions manipulated" by the government which have imposed on appellant the "duplicative and expensive effort" of preparing both a brief in the Eighth Circuit and a jurisdictional statement for this Court (J.S. 2-3 n.1, 6). But it was appellant who sought reconsideration of the district court's January 24, 1983 order of dismissal, rather than prosecuting an immediate appeal. Appellant then waited more than two weeks after it

B. The District Court Correctly Concluded That Appellant Lacked Standing

The doctrine of "representational" or "associational" standing is a very limited exception to the fundamental Article III requirement that the plaintiff before a federal court "be himself among the injured." *Sierra Club* v. *Morton,* 405 U.S. 727, 735 (1972). It allows organizations such as appellant, who have themselves suffered no injury, to seek relief as representatives of their members. To satisfy the requirements of Article III, the members must be shown to have suffered injury sufficient to give them standing to sue in their own right. *Warth* v. *Seldin,* 422 U.S. 490, 511 (1975). But that requirement, taken alone, would confer standing on any association that presented any justiciable claim that any of its members wished to litigate. Accordingly, this Court has also demanded that there be a substantial link between the nature of the claim presented, the purposes of the organization, and the interests of the members. As this Court stated in *Hunt* v. *Washington State Apple Advertising Comm'n,* 432 U.S. at 343, a representative plaintiff must establish that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Appellant has failed to satisfy this test.

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was served with the district court's order denying reconsideration to file notice of appeal (J.S. App. 25a-26a). See J.S. 3 n.2. And appellant did not file its brief in the Eighth Circuit until after the district court had issued a final decision in the underlying action, when the government had already filed notice of appeal in the consolidated (Bradley Boe) action under 28 U.S.C. 1252.

1. *Germaneness.* In its amended complaint appellant said only that it is a "college student-directed, non-profit Minnesota Corporation qualified to do business in the State of Minnesota since February 13, 1971," and that "[f]or the 1981-82 school year, the number of students on ten campuses in Minnesota paying MPIRG fees totalled approximately 42,217" (Amended Complaint paras. 3, 8). In supplemental oral and written submissions to the district court appellant added only that its purpose is " 'to promote the public interest and social welfare' " (J.S. 18).

The district court was clearly correct in holding that the facts alleged by appellant fail to satisfy *Hunt*'s requirement that "the interests it seeks to protect [must be] germane to the organization's purpose" (432 U.S. at 343). Unlike *Hunt*'s first requirement (a showing of injury to association members), which incorporates the Article III prerequisite of injury-in-fact, the insistence on a showing of germaneness is addressed to the prudential issue of whether the association asserting no injury to itself will be an adequate representative of its members. Cf. *Warth* v. *Seldin*, 422 U.S. at 514; *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 51-52 (1974); Fed. R. Civ. P. 23(a)(3), (4). "A local PTA, for example, cannot be expected to represent its members in matters not relating to education." *Boyce* v. *Rizzo*, 78 F.R.D. 698, 704 (E.D. Pa. 1978). This largely factual question is one the district court is best able to determine. Its decision here is consistent with those of other courts in similar cases and does not warrant plenary review. See, *e.g.*, *Associated General Contractors* v. *Otter Tail Power Co.*, 611 F.2d 684, 690-691 (8th Cir. 1979); *Health Research Group* v. *Kennedy*, 82 F.R.D. 21, 28 (D.D.C. 1979)

(germaneness not satisfied in the case of "an organization with the broadest of concerns: the public interest").[6]

2. *Individual participation. Hunt* also requires that an association such as appellant show that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. at 343. Like the issue of germaneness, this factor too is relevant not to Article III's jurisdictional prerequisites but to the adequacy with which an association is likely to represent its members' interests. *National Collegiate Athletic Association* v. *Califano*, 622 F.2d 1382, 1391-1392 (10th Cir. 1980). For example, where the existence of injury or the amount of damages is in question, problems of proof and adequacy of relief may necessitate individual participation. So too, a great diversity of opinion among an association's members may raise concerns about the vigor of its advocacy or the specter of a change in position. Allowing litigation to go forward in the face of such problems can result in wasting the resources of the judiciary and the opposing party, and frustrating the legitimate claims of the plaintiff's members. See, *e.g.*, *Harris* v. *McRae*, 448 U.S. 297, 321 (1980) (citation omitted) (" 'diversity of view within' " the membership of Women's Division); *National Collegiate Athletic Association* v. *Califano*, 622 F.2d at 1392; *Associated General Contractors* v. *Otter Tail Power Co.*, 611 F.2d at 691.

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[6]Appellant now contends that it has a specific institutional interest in the availability of student financial aid and in protecting the constitutional rights of students (J.S. 19-20). But appellant made no allegation below that one of its purposes was to protect the availability of financial aid to its student members, and the only basis for that contention here is its assertion that it has a full-time staff economist (J.S. 20). Appellant's contention that it is interested in protecting its members' constitutional rights is no less broad than its asserted purpose of promoting "the public interest and social welfare."

Notwithstanding appellant's current protestations about a lack of proof (J.S. 11), it conceded in the district court that "there is a diversity of view among its members" (J.S. App. 15a, 17a). Indeed, as the court noted, "97.56 percent of all persons required to register in Minnesota have done so" (*id.* at 14a). Among applicants for aid, it is in the financial interest of all but the few nonregistrants to defend the validity of Section 1113, since the amount of aid available under the Higher Education Act is limited and funds are allocated to students in order of need (J.S. App. 15a, 17a). There is no reason for plenary review of the district court's largely factual conclusion that appellant, in these circumstances, should not be permitted to litigate on behalf of its members claims that the affected individuals can bring on their own.

C. The District Court Did Not Abuse Its Discretion In Denying Appellant Leave To File A Second Amended Complaint

The district court acted well within its discretion in denying appellant leave to file a second amended complaint. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330-333 (1971). Appellant was afforded no fewer than six opportunities — including a first amended complaint —to clarify for the court the facts relevant to its standing (J.S. App. 23a-24a). The court properly ruled that this action had to be terminated at some point.

Moreover, appellant has suffered no substantial prejudice as a result of the district court's ruling. The intervening John Doe plaintiffs, who continued the underlying action, adopted in their preliminary injunction and summary judgment motions the brief appellant filed before it was dismissed. Appellant itself represents as counsel the Bradley

Boe plaintiffs in the companion action now before this Court (No. 83-276).

D. If This Court Declines To Affirm Summarily, It Should Defer Acting On The Jurisdictional Statement Until It Rules On The Merits Of The Underlying Action In Selective Service System v. Minnesota Public Interest Group, No. 83-276

As we made clear above, appellant's appeal was properly transferred to this Court pursuant to paragraph two of 28 U.S.C. 1252. That section does not state, however, nor is it inevitable, that this appeal must be decided simultaneously with the government's appeal from the district court's holding that Section 1113 is unconstitutional. In this case a decision on the constitutional issues does not depend in any way on a resolution of appellant's standing to litigate the identical issues. The government does not dispute that the individual plaintiffs (appellees in No. 83-276) have standing to carry forward the underlying action. See, *e.g.*, *Doe* v. *Bolton*, 410 U.S. 179, 189 (1973) ("we need not pass upon the status of these additional appellants in this suit, for the issues are sufficiently and adequately presented by Doe and the physician-applicants"). The intervening John Doe plaintiffs have not only raised the very issues in which appellant asserts an interest, but in the district court incorporated appellant's brief by reference. Appellant itself represents the Bradley Boe plaintiffs as counsel in this Court in No. 83-276.

Not only is appellant's participation unnecessary to a decision of the underlying constitutional issues, but this Court's determination of those issues could well render moot the question of appellant's standing to sue. If this Court should conclude in No. 83-276 that Section 1113 is unconstitutional, the statute will fall and appellant's claim

that it is invalid will be moot. See *Beneficial Finance of Kansas, Inc.* v. *United States*, dismissed as moot, No. 81-583 (Dec. 13, 1982). In that event the issue of appellant's standing to litigate the validity of Section 1113 will also be moot.

Appellant's constitutional claims will also be moot if the Court concludes that Section 1113 is constitutional.[7] In that case, however, appellant may still want a determination of its standing to pursue the statutory issue left undecided by the district court (see 83-276 J.S. App. 33a).[8] We believe that 28 U.S.C. 1252 would not require the Court to decide this ancillary issue in that eventuality. Cf. *Williams* v. *Zbaraz*, 448 U.S. 358, 368 (1980); *FHA* v. *The Darlington, Inc.*, 352 U.S. 977 (1957). Instead, the appropriate disposition of this appeal would then be to vacate the order of the court of appeals transferring the case to this Court, and permit the court of appeals to determine whether appellants have standing, or otherwise to make an appropriate disposition of the case.

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[7]The fact that the issue of appellant's standing is likely to be moot whatever the outcome of this appeal not only speaks against the need for immediate plenary consideration, but also illustrates the correctness of the district court's conclusion that this is a weak case for representational standing.

[8]In addition to its constitutional claims, appellant asserted in the district court that Section 1113 violated the Privacy Act of 1974, 5 U.S.C. 552a *et seq.* (Amended Complaint para. 13).

CONCLUSION

The judgment of the district court should be summarily affirmed. Alternatively, the Court may wish to defer consideration of the jurisdictional statement until after it decides the underlying constitutional issues in *Selective Service System* v. *Minnesota Public Interest Research Group*, No. 83-276, and then to dispose of the appeal as appropriate in light of that decision.

Respectfully submitted.

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